83-243

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

BROWN & ROOT, INC., WAUKESHA-PEARCE INDUSTRIES, INC. AND HIGHLANDS INSURANCE COMPANY,
Petitioners

v.

BILLY THORNTON AND JAMES H. BROUSSARD,
Respondents

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a land-based worker employed in a construction yard which fabricates fixed offshore drilling platforms (Thornton) or component parts thereof (Broussard) and who is injured on land as opposed to on navigable waters is an "employee" engaged in "maritime employment" under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*?

THE LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioners certify that the following is a complete list of all parties in the proceeding in the Court whose judgment is sought to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. Billy Thornton, Respondent;
2. James Broussard, Respondent;
3. Brown & Root, Inc., Petitioner;
4. Waukesha-Pearce Industries, Inc., Petitioner;
5. Highlands Insurance Company, Petitioner; and
6. Director, Office of Workers' Compensation Programs, United States Department of Labor.

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue for review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 13, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 707 F.2d 149 and is printed in Appendix A to this Petition, *infra*, p. A-1. The opinions of the Benefits Review Board are reported at 12 BRBS 883 and 13 BRBS 37, respectively, and are printed in Appendix B, *infra*, p. A-13 and Appendix C,

infra, p. A-23. The Decision and Orders of the Administrative Law Judges are printed in Appendix D, *infra*, p. A-30 and Appendix E, *infra*, p. A-40.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 13, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Section 902(3) of Title 33 of the United States Code, as it appeared at all times material to this litigation, provided in pertinent part as follows:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder and shipbreaker, but such term does not include a master or member of any crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

STATEMENT OF THE CASE

The Thornton and Broussard cases involve the same issue, to-wit: whether a land-based worker such as Billy Thornton or James Broussard, employed in a construction yard in which fixed offshore platforms are fabricated, are entitled to recover compensation from their respective employers, Brown & Root and Waukesha-Pearce Industries, under the provisions of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

On January 8, 1977, Thornton was injured in a yard of the Petitioner Brown & Root's Greens Bayou fabrication facility at Houston, Texas. At the time of his injury, Thornton was engaged in cleaning up trash, wooden railroad ties and steel rebar and moving this material to another area in the fabrication facility. Thornton sustained an injury to his leg when he fell from the back of a truck while engaged in these duties.

Thornton's usual job was to hook-up construction materials to a crane which transported them to the assembly site. Infrequently and unpredictably, Thornton would assist other workers assigned to his foreman in the "load-out" of a completed platform onto barges for transportation out to sea.

Thornton filed a compensation claim under the provisions of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Petitioners, Brown & Root, Inc. and Highlands Insurance, controverted the claim on the basis of jurisdiction under that statute. The matter proceeded to formal hearing before an Administrative Law Judge. The Administrative Law Judge found that Thornton lacked the requisite "status" for compensation under the statute and denied the claim for compensation. This holding was subsequently affirmed by the Benefits Review Board.

On June 14, 1977, Broussard sustained an injury to his back while working on land in the yard of Petitioner Waukesha-Pearce Industries, Inc. More specifically, James Broussard had been "sheeting the heliport" that was being constructed on land for Tenneco. In this regard, a wooden block was preventing the proper positioning of the sheeting and, consequently, he got off of

the heliport in order to move the wooden block. When he lifted the wooden block, Mr. Broussard experienced back pain.

Broussard had been working as a fabrication fitter at Waukesha-Pearce Industries, Inc. in Iberia Parish, Louisiana for approximately 20 months at the time of his accident and his duties included the construction of buildings, heliports and power plants. All of the structures that were built by Waukesha-Pearce Industries, Inc. at the yard in Iberia Parish were ultimately placed on a fixed platform, offshore, in connection with oil drilling operations, and permanently affixed to the bottom of the ocean.

The only time that fitters, such as James Broussard, would proceed onto a barge would be during a "load-out" of a completed platform onto barges for transportation out to sea. He was only involved in three load-outs during the 20 months that he worked for Waukesha-Pearce Industries before his accident, and he acknowledged that there was no "load-out" taking place at the time of his accident.

James Broussard filed a claim for benefits under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, which was then controverted by Petitioners, Waukesha-Pearce Industries, Inc. and Highlands Insurance Company. The claim was heard by an Administrative Law Judge, who ruled that James Broussard did not meet either the "status" or "situs" test established by this Court in the decision of *Northeast Marine Terminal Company v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). This ruling was subsequently affirmed by the Benefits Review Board, which held that since James Broussard did not meet

the "status" test, it was not necessary to decide the issue of situs.

The United States Court of Appeals for the Fifth Circuit consolidated the Thornton and Broussard cases and considered the Respondents' appeals of the rulings by the Benefits Review Board. On June 13, 1983, the United States Court of Appeals for the Fifth Circuit issued its opinion reversing the prior opinions of the Benefits Review Board and the Administrative Law Judge on the question of the "status" and remanded the cases for a determination of the question of "situs".

REASONS FOR GRANTING THE WRIT

There are four compelling reasons why a review on Writ of Certiorari should be granted in this case:

1. The issue presented for review concerns an extremely important question of the construction and interpretation of a federal statute and the application of federal law.
2. The decision of the United States Court of Appeals for the Fifth Circuit conflicts with the intent of Congress as expressed in its addition of the "status" test in the 1972 amendments to the Act.
3. The opinion of the United States Court of Appeals for the Fifth Circuit conflicts with the prior opinions of this Court regarding whether offshore exploration for oil and gas is maritime commerce.
4. The decision of the United States Court of Appeals for the Fifth Circuit conflicts with opinions of other circuit courts regarding the definition of "maritime employment" under the Act.

The construction and interpretation of the provisions of § 902(3) of the Longshoremen's & Harbor Workers' Compensation Act, as amended in 1972, are vital to the administration of justice in connection with the ever-increasing multitude of claims for compensation filed under the Act.[1] The opinion of the United States Court of Appeals for the Fifth Circuit in this case is in conflict with its prior decisions and is an unprecedented expansion of coverage to employees upon whom Congress did not intend to bestow longshore benefits. This expanded coverage is based on a definition of "maritime employment" which conflicts with the definition given to that term by at least two other circuit courts, and a determination that offshore exploration for oil and gas is maritime commerce which is in conflict with this Court's prior authority. Thus, this Court has a significant interest in determining the construction and application of this federal statute, and resolving the conflict which the lower appellate court has created regarding the issue of "status" under § 902 (3) of the Act.

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1. A report issued by the Employment Standards Administration of the Office of Workers' Compensation Programs, U.S. Department of Labor, indicates that 222,654 injuries were reported under the Longshoremen's & Harbor Workers' Compensation Act for the fiscal year ending in September 1981, and this number represented an increase of approximately 22% over the number of injuries reported for the year ending in 1977. *Longshoremen's & Harbor Workers' Compensation Act, Annual Statistical Report*, December 1981. Further, the Labor Department estimated that 253,000 injuries would be reported for the fiscal year ended in 1982. Office of the Comptroller General of the United States, *Longshoremen's & Harbor Workers' Compensation Act Needs Amending*, April 1, 1982. The Petitioners note that these statistics indicate that the U.S. Department of Labor is facing an ever-increasing backlog of claims which is reaching epidemic proportions, and that a further unprecedented and unwarranted influx, such as that which will be occasioned after the appellate court's opinion in this case, will further slow, if not stop, the already osmotic administration of claims under the Act.

The importance of the question presented is further established by the language of this Court in the recent case of *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, ____U.S.____, 103 S.Ct. 634 (1983). In *Perini*, this Court noted that after the 1972 amendments to the Act, "it became necessary to describe affirmatively the class of workers Congress desired to compensate"; 103 S.Ct. at 648; and "[w]e have had no occasion as yet to determine other possible applications of the status test to activities performed on the expanded landward situs". 103 S.Ct. at 648, n. 27. Thus, this case presents the Court with an immediate opportunity to further define and describe the class of workers to whom Congress intended to extend coverage after the expansion of the landward situs by the 1972 amendments to the Act, thereby giving the lower appellate and administrative courts necessary guidance in an area which has become increasingly unclear after the Fifth Circuit's most recent efforts.

CONFLICT WITH CONGRESSIONAL INTENT

The legislative history of the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act clearly indicates that Congress did not intend to extend the coverage of the Act to each and every employee engaged in occupations on the expanded landward situs. The joint Committee report published by both houses of Congress shows that Congress intended only to cover employees engaged in longshoring and shipbuilding activities and provided that:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing

> or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are *directly* involved in the loading or unloading function are covered. . . .

S. Rep. No. 92-1125 p. 13 (1972); H.R. Rep. No. 92-1441 pp. 10-11 (1972), *reprinted in* [1972] U.S. Code Cong. & Adm. News 4698, 4708 (emphasis added). Thus, Congress intended to afford coverage under the Act to those employees directly involved in commercial maritime enterprises and those employees on the periphery, such as inland truck drivers who carried the cargo from storage warehouses at dockside, were not to be afforded coverage under the Act.

As was stated by this Court in *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates,* ____U.S. ____, 103 S.Ct. 634 (1983), the "comment [the joint Committee report quoted above] indicates that Congress intended the status requirement to define the scope of the extended landward coverage". 103 S.Ct. at 648 (parenthetical expression added). Furthermore, as was recognized by the dissent in *Perini,* under the doctrine of *esjusdem generis,* the expansion of coverage to "other persons" should be limited to the reasonable logical limitations indicated by the preceding specific examples of covered occupations cited in the statute and similar maritime situations. 53 S. Ct. at 652-53, n. 2. Surely, the limitless and expansive coverage afforded by the opinion of the Fifth Circuit in

this case conflicts with this recognized rule of statutory construction.

Further, Justice Stevens' dissent in *Perini* supports the position that the expansion of coverage under the Act proposed by the Fifth Circuit in this case is unwarranted and unprecedented considering the logical limits of coverage indicated by the specific subcategories included in the statute. Justice Stevens noted that not "a single word in the Committee Hearings, the Committee Reports or the Legislative Debates" suggested that the scope of coverage under the Act was to be extended to workers who do not fall within the reasonable limitations of the two stated subcategories—longshoremen and harborworkers. 53 S. Ct. at 653. Thus, it is clear that the expansive reading which the Fifth Circuit has given to the Act in this case is inconsistent with a recognized principle of statutory construction and is totally unsupported by the legislative history and congressional intent in the passage of the 1972 amendments to the Act.

In fact, during the legislative process which culminated in the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act, Congress did consider a proposed amendment which would have included offshore oil workers within the scope of coverage under the Act. This proposed amendment was S. 1547, also known as the "Tower bill". However, after conducting substantial hearings on this proposed amendment, Congress elected not to include the "Tower bill" within the 1972 amendments to the Act. *See, Hearings Before the Sub-Committee on Labor of the Senate Committee on Labor and Public Welfare on S. 2318, S. 525 and S. 1547,* 92nd Cong., 2d Sess. 60, 256-58, 393-411, 511-59, 574-

614. Thus, during the legislative process which culminated in the creation of the "status" and "situs" tests utilized today to determine jurisdiction under the Act, Congress considered including offshore oil workers within the coverage of the Act but elected not to include them after considering substantial testimony from proponents and opponents of that proposed amendment.

Finally, the dissenting opinion of Judge Gee in the Fifth Circuit panel decision of *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1981) notes that despite numerous congressional attempts to include offshore oil workers within the coverage of the Longshoremen's & Harbor Workers' Compensation Act, the representatives of offshore oil field personnel, members of the plaintiff's personal injury bar and union representatives, have strenuously and successfully argued against coverage in reliance on their conception that these workers are better off seeking a remedy under the Jones Act. 664 F.2d at 471-72 n. 8. In reviewing this course of events, Judge Gee concluded:

> "Despite all of this activity from 1971 until the present and despite its obvious awareness of the issue, Congress has not seen fit to do what *Pippen* and the majority do today—riding to the rescue of workers who wish to be left where they are.

664 F.2d at 472 n. 8. Thus, there is no question that Congress is aware of the occupational status of offshore oil field workers, and those workers' desire not to be included within the coverage of the Longshoremen's & Harbor Workers' Compensation Act. Accordingly, Congress has seen fit not to include them within its scope. Yet, in this case, the Fifth Circuit has extended coverage to the

Respondents in contravention of this clear congressional policy and intent.

Unquestionably, the Fifth Circuit's unprecedented extension of coverage to the Respondents in this case is in conflict with the stated congressional intent of the Act and violates a well-recognized principle of statutory construction. As stated previously, the Respondents were primarily engaged in the transport of construction materials to the assembly site and the fabrication of component parts for fixed offshore platforms. They had no direct function whatsoever in the actual drilling process offshore, which the Fifth Circuit has previously held is maritime commerce. Their functions are on the periphery in relation to the offshore drilling process and are analogous to the inland carrier who transports cargo from a shoreside warehouse, a function which Congress specifically stated was not to be covered under the Act. Finally, the breadth of coverage afforded under the Fifth Circuit's opinion seemingly has no bounds and could result in the further slowing of the wheels of a system of administrative justice which is at best years behind.

CONFLICT WITH PRIOR OPINIONS OF THIS COURT

The Fifth Circuit's ruling that these landside accidents in the offshore oil industry are covered by the Act is in direct conflict with this Court's holdings in *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for the following reasons.

This Court in *Rodrigue* held that oilfield workers were not maritime workers and that oilfield work was landside

work. In the *Rodrigue* case, this Court considered two cases involving fatal accidents on fixed platforms off the Coast of Louisiana. Since the platforms were permanently affixed to the Outer Continental Shelf, this Court ruled that such fixed platforms were not vessels but were instead artificial islands which did not come within admiralty jurisdiction. Likewise, this Court in *Huson* reiterated the principle adopted in *Rodrigue* and found that admiralty law was not applicable to artificial islands and fixed structures.

The Longshoremen's & Harbor Workers' Compensation Act makes reference to maritime workers (apart from those specifically described therein, such as shiploaders, ship-builders, etc.). There is nothing in the jurisprudence which makes a distinction between "maritimeness" for purposes of coverage under the Longshoremen's & Harbor Workers' Compensation Act and "maritimeness" for other purposes. A worker is either "maritime" or he is not.

This was a basis of the Fifth Circuit's reasoning in *In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974) *cert. dismissed*, 423 U.S. 886 (1975). In *Dearborn*, the Fifth Circuit observed that *Rodrigue* made clear that "under traditional jurisdictional principles, maritime law is inapplicable to platform based accidents". 499 F.2d at 272. *Dearborn* involved an offshore oil platform explosion and fire off the Coast of Texas which extended to a vessel moored to the platform. The Fifth Circuit held that the wrongful death action against the platform owner and subcontractor was not governed by admiralty law but by the land law of Texas.

In *Terry v. Raymond International, Inc.*, 658 F.2d 398 (5th Cir. 1981), *reh'g en banc denied*, 667 F.2d 92

cert. denied, 456 U.S. 928 (1982), the Fifth Circuit reaffirmed its holding in *Dearborn* and held that accidents on petroleum platforms were not under maritime jurisdiction. The *Terry* Court stated that "the cases make clear that federal maritime law does not apply to accidents which occur on offshore petroleum platforms". 658 F.2d at 404. The Fifth Circuit further found that the recent developments in admiralty law confirmed that premise. Finally, the Fifth Circuit recognized that Terry was engaged in duties, conversion of an offshore drilling platform to a production platform, "having little to do with traditional maritime activities". 658 F.2d at 405.[2]

Oilfield service work is not now and never has been "traditional maritime activity". Oilfield service work did not bear a "significant relationship" to maritime navigation and commerce in *Rodrigue* or in the jurisprudence decided thereafter and there has been no change in the nature of oilfield work since the *Rodrigue* decision. However, the Fifth Circuit stated the contrary in their decision in the *Thornton* case. 707 F.2d at 153. The Fifth Circuit's decision and reasoning is directly in contravention with the principles espoused in *Rodrigue, In re Dearborn,* and *Terry.*

The Fifth Circuit cites the cases of *Pippen v. Shell Oil Co.,* 661 F.2d 378 (5th Cir. 1981), *Boudreaux v. American Workover, Inc.,* 680 F.2d 1034 (5th Cir.

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2. The Petitioners note that this holding of the Fifth Circuit was related to a question of applying the comparative negligence scheme under admiralty law as opposed to a state contribution scheme. Of course, it would be incongruous for an employee to be considered a "maritime employee" for purposes of recovery of compensation from his employer and to be a "nonmaritime" employee for purposes of third-party actions.

1982) (en banc), *cert. denied*, ____U.S.____, 103 S.Ct. 815 (1983), and *Herb's Welding v. Gray*, 703 F.2d 176 (5th Cir. 1983) application for rehearing pending, as authority for its decision in *Thornton;* however, each of these cases can readily be distinguished from the present situation.

The plaintiff in *Pippen* was a wireline operator working aboard a *vessel* when he slipped and injured himself as opposed to the Respondents who were working on land. The Fifth Circuit concluded that Pippen was covered under the Longshoremen's & Harbor Workers' Compensation Act because his "work was essential to the function of the vessel" and therefore bore a "realistically significant relationship to maritime navigation or commerce". 661 F.2d at 383. There is no doubt that the proper functioning of a vessel upon navigable waters is maritime in nature. In addition, the injury occurred on the actual navigable waters, which this Court in *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, ____U.S.____, 103 S.Ct. 634 (1983), has held sufficient to meet the status requirements under § 902(3) of the Longshoremen's & Harbor Workers' Compensation Act, because it would have been covered prior to the 1972 amendments and Congress did not intend to restrict coverage.

Likewise, the plaintiff in *Boudreaux* was injured while performing work aboard a drilling *vessel* located offshore but in state territorial waters. The Fifth Circuit based its decision in part on the fact that the 1972 amendments to the Act did not disturb the previous test that the Act covers all injuries on navigable waters. Thus, the facts

of the *Pippen* and *Boudreaux* cases are inapposite to our situation and the reasoning in those cases should not control the outcome of this case.[3]

Although Mr. Gray in the *Herb's Welding* case was working on a fixed platform when he was injured, the Fifth Circuit's rationale in that case should not be allowed to stand because it goes far beyond the purpose and intent of Congress in enacting the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act. Simply because oilfield work deals with oil and gas under navigable waters, one cannot conclude that such work is maritime because this rationale will ultimately result in a wholly land-based employee, doing land-based work, being categorized as a "maritime worker".

Finally, even assuming *arguendo* that the Fifth Circuit was correct in its determination that the offshore oil industry is maritime commerce, the scope of coverage based on that determination has its limits. Clearly, the injured parties in *Pippen, Boudreaux* and *Herb's Welding* were all persons involved in the actual offshore drilling and production process. Whereas, the Respondents were involved in land-based construction activities similar to those which the Fifth Circuit had previously determined were not maritime in nature.[4]

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3. Additionally, it should be noted that Judge Gee's dissent in the panel opinion filed in *Boudreaux* indicates that there is some question regarding the precedential support for the Fifth Circuit's conclusion in *Pippen* that the offshore oil industry is maritime commerce. Specifically, Judge Gee recounts that the only authority cited which actually supports the *Pippen* conclusion is *St. Julien v. Diamond M. Drilling Co.*, 403 F. Supp. 1256 (E.D. La. 1975), a district court opinion "whose 'general extension' rationale was . . . rejected" by this Court in *P. C. Pfeifer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979). 664 F.2d at 479.

4. See footnote 2, *infra*, and accompanying text.

The Fifth Circuit has extended the rationale of the *Herb's Welding* case to the present case under consideration and ultimately concluded that Thornton and Broussard, landbased construction workers participating in the fabrication of offshore platforms which are "artificial islands", were engaged in maritime employment. It is the legislative branch of the government which is responsible for enacting the laws of the United States as they deem fit and the judicial branch should refrain from engaging in the legislative function by extending laws beyond their statutory language and intent. The *Herb's Welding* decision is wrong for the same reasons that the Fifth Circuit's decision in *Thornton* is wrong, i.e., the Fifth Circuit ignores the principle established in *Rodrigue,* which has been uniformly followed by the United States appellate courts and district courts, that fixed offshore platforms as artificial islands do not come within admiralty jurisdiction and have no maritime nexus.

CONFLICT WITH OTHER CIRCUITS

To date, this Court has determined "status" questions under § 902(3) of the Longshoremen's & Harbor Workers' Compensation Act by referring to the explicit language of the statute. Although this Court in *Perini* referred to the "significant relationship" test as developed in *Weyerhaeuser Company v. Gilmore,* 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976), a precise test was not adopted. As stated in *Perini:*

> We have had no occasion as yet to determine other possible applications of the status test to activities performed on the expanded landward situs. Although we do not maintain that landward coverage could never be determined by reference to anything but

> the explicitly enumerated categories of activities in the section 2(3) definition of "employee", we note that our cases to date have focused on these explicit categories because the legislative history indicates that Congress intended to extend landward coverage to those specifically included occupations. See S. Rep., at 13; H. Rep., at 10-11. See also Northeast Marine Terminal Co., supra, at 273, 53 L.Ed.2d 320, 97 S.Ct. 2348.

103 S.Ct. at 648 n. 27. The instant case affords this Court the perfect opportunity to clarify and define the test which should be utilized to determine "status" under § 902(3) of the Act. In making such a clarification, this Court will establish the proper guidelines for the lower appellate courts, some of which are in disagreement concerning the appropriate test which should be utilized.

In this regard this Court in *Perini* recognized that the Ninth Circuit and the Second Circuit were in agreement as to the definition of "maritime employment", whereas the Fifth Circuit has taken a contrary position. 103 S. Ct. at 639, n. 8. Although this Court's recognition of the split between the circuit courts was actually directed to coverage of employees injured "over navigable waters", the discussion by the Court of that point indicates that the Ninth Circuit's definition of "maritime employment" includes a relationship to navigation or commerce on navigable waters, an element of the *Weyerhaeuser* test which is not utilized by the Fifth Circuit. In fact, the Fifth Circuit has recognized that the *Weyerhaeuser* definition is more stringent in its application than the definition of "maritime employment" which it utilizes. *Ward v. Director, Office of Workers' Compensation Programs*, 684 F.2d 1114, 1117 (5th Cir. 1982), *cert. denied*, ___ U.S.___, 103 S. Ct. 815 (1983).

In its opinion in this case, the United States Court of Appeals for the Fifth Circuit defined "maritime employment" as an occupation which has a "realistically significant relationship with traditional maritime activity". *Thornton*, 707 F.2d at 152. On its face, this definition would seemingly equate with the definition adopted by the Ninth and Second Circuits for "maritime employment".

On close inspection, however, the conflict in the definition becomes readily apparent. Both the Ninth Circuit and the Second Circuit have defined "maritime employment" as occupations which "must have a realistically significant relationship to traditional maritime activity *involving navigation and commerce on navigable waters*". *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976); *Fusco v. Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) (emphasis added).

Thus, the definition which these circuit courts utilize for the term "maritime employment" clearly limits its effective scope to maritime activities performed in relation to navigation and commerce on navigable waters. In fact, the Ninth Circuit has limited its expansion of the *Weyerhaeuser* definition to operations which are clearly related to maritime activity, such as building dock facilities and inspecting recreational vessels. *Schwabenland v. Sanger Boats*, 683 F.2d 309 (9th Cir. 1982), *cert denied*, ____U.S.____, 103 S. Ct. 814, (1983); *Duncanson-Harrelson Company v. Director, Office of Workers' Compansation Programs*, 686 F.2d 1336 (9th Cir. 1982), appeal pending.

Finally, although the other major maritime circuit courts which have dealt with the question of "maritime employment" have not carefully delineated a definition for that term, it appears that those courts apparently ascribe to the definition advanced by the Second Circuit and Ninth Circuit. *Graziano v. General Dynamics Corportation,* 663 F.2d 340 (1st Cir. 1981); *Caldwell v. Ogden Sea Transport, Inc.,* 618 F.2d 1037 (4th Cir. 1980); *Dravo Corporation v. Banks,* 567 F.2d 593 (3d Cir. 1977). As is indicated by their opinions, these circuit courts have limited the scope of the term "maritime employment" to occupations which facilitate traditional shipping and shipbuilding operations. Unfortunately, the Fifth Circuit has not exercised such restraint.

Other examples of proper restraint in this area have been demonstrated by the Third Circuit and the Fourth Circuit in *Lynn v. Heyl and Patterson, Inc.,* 483 F.Supp. 1247 (W.D. Pa.), *aff'd,* 636 F.2d 1209 (3d Cir. 1980) and *Conti v. Norfolk & Western Railway Company,* 566 F.2d 890 (4th Cir. 1977). In *Lynn,* an ironworker participating in the construction of a barge haul system at a site located on the edge of the Ohio River was injured onland during construction activities. Although a crane barge was utilized in the construction operations and the Plaintiff had often boarded it, the court found that his construction duties did "not require him to load, repair or build navigable vessels. [and] . . . such work [construction] has no significant relationship to traditional maritime employment." 483 F.Supp. at 1255.

In *Conti,* three railroad brakemen who were injured in the course of operations relating to the emptying of coal-hopper cars onto a conveyor to be transported to a pier

and then to a ship, were found not to be engaged in "maritime employment". The Court stated that the occupations of the plaintiffs "were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading". 566 F.2d at 895. The *Lynn* and *Conti* cases demonstrate the proper restraint in the determination of "status" questions on the expanded landward situs. Identical restraint should have been exercised by the Fifth Circuit in the instant situation.

The cases cited hereinabove clearly reveal that the Fifth Circuit's definition of "maritime employment" in the instant case represents a vast expansion and departure from the definition of that term currently utilized by the Second, Third, Fourth and Ninth Circuits. Moreover, this Court in its recent decision in *Perini* noted that it had not yet had an opportunity to consider the other possible applications of the "status" test on the expanding landward situs. This case presents the Court with such an opportunity.

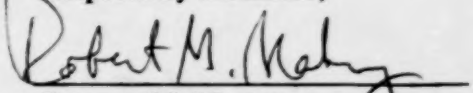
Thus, this Court should grant this Petition for Certiorari in order to affirmatively delineate the definition of the term "maritime employment" which is to be used in jurisdictional determinations of coverage under the Longshoremen's & Harbor Workers' Compensation Act, a federal statute. Such clarification is greatly needed, so that the courts of all circuits in the United States can attain uniformity and consistency in their decisions as regards coverage under the Act, a federal statute, which affects employees throughout the country.

CONCLUSION

Therefore, congressional intent and prior authority of this Court and the United States Courts of Appeals for the Second, Third, Fourth and Ninth Circuits mandate the conclusion that Respondents Thornton and Broussard are not entitled to coverage under the provisions of § 902(3) of the Longshoremen's & Harbor Workers' Compansation Act. The opinion of the United States Court of Appeals for the Fifth Circuit in this case is in conflict with this congressional intent and the prior authority of this Court, the Second, Third, Fourth and Ninth Circuits and its own prior holdings. Accordingly, this Petition should be granted and the opinion of the United States Court of Appeals for the Fifth Circuit should be reversed and the previous opinions of the Benefits Review Board and the Administrative Law Judge affirmed.

For the foregoing reasons, Petitioners respectfully submit that the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,



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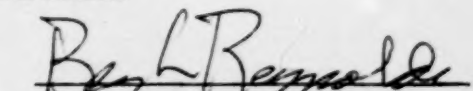

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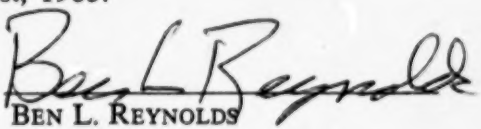
CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari have been served upon each of the parties required to be served, i.e., on Respondent Thornton by placing the same in an envelope and depositing in the United States Mail, with first-class postage pre-paid, addressed to the counsel of record as follows: Atreus M. Clay, Esq., 5643 Turtlecreek Road, Houston, Texas 77017; on the Respondent Broussard, by placing the same in an envelope and depositing in the United States Mail, with first-class postage pre-paid, addressed to the counsel of record as follows: William P. Rutledge, Esq., Domengeaux & Wright, P. O. Box 3668, 201 West Ninth Street, Lafayette, Louisiana 70501; on the Director by placing the same in an envelope and depositing in the United States Mail, with first-class postage pre-paid, addressed to the counsel of record as follows: Joshua T. Gillelan, Esq., Office of the Solicitor, U.S. Dept. of Labor, Suite N-2620, 200 Constitution Avenue, Washington, D.C. 20210; and on the Solicitor General of the United States by placing the same in an envelope and depositing in the United States Mail, with first-class postage pre-paid, addressed as follows: Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 11th day of August, 1983.



BEN L. REYNOLDS

APPENDIX A

Billy THORTON, Petitioner

v.

BROWN & ROOT, INC., Highlands Insurance Company, and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents,

and

James H. BROUSSARD, Petitioner,

v.

WAUKESHA-PEARCE INDUSTRIES, INC., Highlands Insurance Company, and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

Nos. 80-2343, 81-4032.

United States Court of Appeals, Fifth Circuit.

June 13, 1983.

Petitions were filed seeking review of orders of the Benefits Review Board which denied petitioners' recovery under the Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Brown, Circuit Judge, held that worker, whose land-based job was helping to construct offshore stationary platforms for production of oil, and another worker, whose land-based job was helping to build the living quarters and heliports indispensable to successful functioning of the fixed production

platforms, were employees for purposes of the Longshoremen's and Harbor Workers' Compensation Act.

Reversed and remanded in part.

Atreus M. Clay, Houston, Tex., for Thornton.

Bradley Jackson, Ben L. Reynolds, Houston, Tex., for Brown & Root, Inc. and Highlands Ins. Co.

Joshua T. Gillelan, II, Dept. of Labor, Washington, D.C., for U.S. Dept. of Labor.

William P. Rutledge, Lafayette, La., for Broussard.

Robert Mahoney, Lafayette, La., for Waukesha, et al.

Petitions for Review of Orders of the Benefits Review Board.

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Petitioner Billy C. Thornton was employed on land by Brown & Root, Inc., constructing offshore stationary platforms for the production of oil. Petitioner James Broussard worked on land for Waukesha-Pearce Industries in the construction of housing modules and heliports for offshore stationary platforms.[1]

On occasion, as part of his job, each man helped load finished platforms or platform modules onto ocean-going barges. Each petitioner was injured on the job, and ap-

1. Highlands Insurance Co. is the compensation insurance carrier for both employers.

plied for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA). Neither was injured while engaged in loading operations. In each case the ALJ denied LHWCA benefits, holding that the injured worker neither had employee status nor received his injury on a covered situs as defined by the Act. The Benefits Review Board upheld each decision, agreeing that neither Thornton nor Broussard was a covered employee, but declining to reach the question of whether either was injured on the navigable waters. We hold, however, that both Thornton and Broussard had employee status under § 902(3) of the LHWCA. Accordingly, in each case we reverse the decision below and remand for reconsideration of whether the petitioner was injured on a covered situs.

Thornton's Tumble

Thornton was employed as a rigger at Brown & Root's Greens Bayou Fabrication Facility alongside the ship channel in Houston, Texas. This facility was used for the construction of stationary offshore drilling platforms. Thornton's usual job as a rigger was to hook construction materials up to a crane, which would then move them into position for assembly. At times, as part of his employment, he would help to "load-out" a completed platform from the facility onto barges, to be taken out to sea and fixed to the ocean floor.[2]

2. Because of the size of the platforms and because the barges often had to be modified to receive them, each load-out took from one to seven days to complete. Seven to ten load-outs occurred every year. As found by the ALJ, a rigger spent an average of 21 workdays per year helping to load-out a platform. Using that 21 workdays average, one can calculate that a rigger who worked 260 days per year (five days a week for 52 weeks) would spend approximately 8% of his working time engaged in loading-out operations.

On the day of his injury, Thornton was not engaged in a load-out. On the contrary he was moving trash, wooden railroad ties and rebar[3] from D-yard of the facility, directly adjacent to the ship channel, to C-yard, approximately one quarter mile away, in order to clear room for platform construction in D-yard. He injured his leg when he fell from the back of a truck in C-yard.[4] No load-out was underway at the facility at the time.

The ALJ found that Thornton was not an "employee" under 33 U.S.C. § 902(3)—the so-called "status" test for coverage under the LHWCA—and that he was not injured upon the "navigable waters" as defined by 33 U.S.C. § 903(a)—the "situs" test.[5] The Benefits Review Board reached only the question of Thornton's employee status under § 902(3), and affirmed the ALJ's decision on that issue. *Thornton v. Brown & Root, Inc.*, BRB 79-126 (Nov. 28, 1980). Thornton was thus denied any relief under the LHWCA.

Broussard's Bad Back

Broussard was one of approximately 10-11 fitters employed at Waukesha-Pearce's construction yard adjacent to navigable waters at the Port of Iberia, Louisiana. At this facility, Waukesha-Pearce built housing modules, some of which included heliports on top, for fixed off-

3. Rebar is steel reinforcing bar used in construction.

4. Both Thornton and Brown & Root agree that Thornton was temporarily and totally disabled from January 8, 1977, the date of the accident, to March 30, 1977. Thornton claims that he retains a 25% permanent disability, while Brown & Root claims that Thornton's disability is only 15%.

5. She also held that Thornton had only a 15% permanent disability.

shore platforms. After completion, these platform modules were loaded onto barges and taken to their permanent locations.[6]

Broussard injured his back on land, while moving a wooden block out of the path of a tire of a mobile cherry picker, which was being used in the construction of a heliport. No load-out was in progress at the facility at the time.

As in *Thornton*, the ALJ held that Broussard was not an "employee" under § 902(3), and that he was not injured "upon the navigable waters of the United States," as required by § 903(a). Also as in *Thornton*, the Benefits Review Board affirmed the ALJ's ruling that Thornton was not an "employee" under § 902(3), but did not reach the § 903(a) situs issue. *Broussard v. Waukesha-Pearce Industries, Inc.*, BRB 79-422 (Dec. 22, 1980).

Oil upon the Waters—"Maritime Employment" Under § 902(3)

In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977) the Supreme Court for the first time considered the effect of the 1972 amendments to the LHWCA. The Court concluded, among other things, that the amended Act required an injured claimant both to have been an "employee," as

6. As in Brown & Root's case, the loading-out process often involved the modification of the barges. The ALJ found that 19 load-outs took place during the twenty and one-half months that Broussard was employed with Waukesha-Pearce, and that Broussard took part in three of these. He also found that an average of two fitters were required on every load-out. Broussard contends that in fact he participated in more load-outs than shown by the evidence produced by Waukesha-Pearce at the administrative hearing.

defined by § 902(3)[7] and to have been injured "upon the navigable waters of the United States," as defined by § 903(a).[8] *See also P. C. Pfeiffer v. Ford,* 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979). These two jurisdictional requirements are commonly referred to as the "status" (§ 902(3)) and the "situs" (§ 903(a)) tests. If either status or situs is missing, a claimant's injury ordinarily is not covered by the Act. The Benefits Review Board did not consider the situs question in either of these cases, but instead decided against the claimants on the basis of status. We conclude that both Thornton and Broussard meet the status test of § 902(3).

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7. § 902. *Definitions*
When used in this chapter—
* * * * * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

8. § 903. *Coverage*
(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.) No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

[1, 2] In deciding whether a worker is an employee under § 902(3), our underlying concern is whether he or she was "engaged in maritime employment." Maritime employment is not limited to the occupations specifically listed in § 902(3). *See Miller v. Central Dispatch, Inc.*, 673 F.2d 773 (5th Cir. 1982); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir. 1981); *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994 (5th Cir. 1981); *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980); *Odom Construction Co., Inc. v. United States Department of Labor*, 622 F.2d 110 (5th Cir. 1980). Moreover, when considering the question of whether a worker is engaged in maritime employment, "we must look to the purpose of the work, not solely to the particular skills used." *Trotti & Thompson*, 631 F.2d at 1221, n. 16. As we pointed out in *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), "The relevant inquiry in determining whether an employee was engaged in maritime employment is whether his activities had a 'realistically significant relationship to traditional maritime activity' ". 661 F.2d at 382, *quoting Bosarge*, 637 F.2d at 998 and *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976).

Pippen was a wireline operator who was injured on a drilling barge while employed to perforate and set packers on the drilling rig. The defendants in the case claimed that Pippen was not engaged in maritime employment as required by § 902(3) and thus not entitled to compensation under the LHWCA. Citing *Bosarge, supra*, the Court employed the "significant relationship" test and determined that Pippen was indeed engaged in maritime employment. The *Pippen* court concluded,

> The "significant relationship" requirement can be met when the purpose of the employee's activities is to facilitate maritime commerce. Since offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce, it follows that the purpose of Pippen's work was to facilitate maritime commerce.

661 F.2d at 383-84.

The Court went on to observe,

> Indeed, the performance of a function that is essential to the effectuation of the offshore drilling process is work that certainly has a realistically significant connection to traditional maritime activity.

661 F.2d at 385.

In *Director, Office of Workers' Compensation Programs v. Perini North River Associates,* ____U.S.____, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983) the Supreme Court held that it is neither necessary nor correct to apply the "substantial relationship" test to workers injured on the actual navigable waters. "[W]hen a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) [§ 902(3)] . . ." ____U.S. at____, 103 S.Ct. at 651, 74 L.Ed.2d at 485. This Court had earlier reached the same conclusion in *Boudreaux v. American Workover, Inc.,* 680 F.2d 1034 (5th Cir. 1982) (en banc). Therefore, the "significant relationship" test need no longer be used in a case like *Pippen,* in which the plaintiff was in fact injured upon the actual navigable waters.

Neither *Perini North River* nor *Boudreaux* decided the question of whether the substantial relationship test should

be applied to determine the status of workers injured on land, within the LHWCA's expanded version of the navigable waters. *Boudreaux* stated that such a test may be appropriate, however. "To delineate only those shoreside employees who were legislatively intended to be included within the coverage of the Act, the *Weyerhaeuser* or an equivalent maritime-relationship test may indeed be appropriate." 680 F.2d at 1049.

Since *Boudreaux*, the Court has in fact adopted and applied that test. "The 'realistically significant relationship' test remains viable for workers injured upon land, be it natural or artificial." *Herb's Welding v. Gray*, 5th Cir., 1983, 703 F.2d 176.

For our purposes, in this case, *Boudreaux's* greatest importance lies in its endorsement of *Pippen's* holding that offshore drilling for and production of oil and gas is maritime commerce. *Boudreaux* quotes those sections of *Pippen* which so hold, and approves *Pippen's* result and rationale. *Herb's Welding*, moreover, expressly follows *Pippen*.

[3] It is firmly established in this Circuit, then, that "[o]ffshore drilling—the discovery, recovery, and sale of oil and natural gas from the sea bottom—is maritime commerce." *Pippen*, 661 F.2d at 384. A worker whose job directly facilitates that process is engaged in employment which has a substantial relationship to maritime commerce. This is true of production from fixed offshore platforms as well as of recovery and exploration from mobile drilling barges.

[4] It is clear, therefore, that both Thornton and Broussard satisfy the status requirement of § 902(3).

Thornton's job was helping to construct the platforms themselves, while Broussard's was helping to build the living quarters and heliports indispensable to the successful functioning of the fixed production platforms. We conclude, therefore, that both were engaged in maritime employment and had employee status under § 902(3) of the LHWCA.[9]

Employee status alone does not suffice to afford Thornton and Broussard LHWCA coverage, however. As we have already pointed out, a successful LHWCA claimant must prove not only that he was an employee, but also that he was injured on a covered situs—the navigable waters as defined by the Act. In each of these cases, the ALJ concluded that the place of injury was not a covered situs. The Benefits Review Board did not consider the question.

We are convinced that in each of these cases there should be a factual reexamination of the record and an initial determination by the factfinder of the situs issue. In each, the ALJ's determination that the situs requirement was not met was founded upon two incorrect assumptions: that the construction taking place at the facility was not a "maritime enterprise" and that the platforms or modules even when loaded onto barges, could not properly be considered "cargo in maritime commerce." In light of our decisions in *Boudreaux*, *Pippen* and *Herb's Welding*, those

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9. In rejecting Thornton's and Broussard's claims to employee status, the Benefits Review Board looked at the amount of time each man spent in load-out operations, and concluded that neither had employee status because neither spent a "substantial portion" of his time in longshoring activities. The "substantial portion" test has been emphatically rejected by this Court. *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980); *Howard v. Rebel Well Service*, 632 F.2d 1348 (5th Cir. 1980).

propositions are no longer tenable. Consequently, we remand each case to the Board for separate consideration of whether Thornton and Broussard satisfy the situs requirement of § 903(a). If so, the Board must decide the proper amount of benefits to be awarded each claimant.

The Director's Role

[5] These cases also present the procedural question of whether the Director of the Office of Workers' Compensation Programs is entitled to appear in these proceedings as a party respondent. The motion by Brown & Root and Highlands to strike the Director as a party respondent was carried with the case. The issue was recently settled in the Director's favor in *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982). In *White*, the Court considered the applicability of F.R.A.P. 15(a) to this very question. Rule 15(a) sets forth a method for obtaining review of the order of an administrative agency in the courts of appeal. It states, in pertinent part, "The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. . . . In each case the agency shall be named respondent." The Court, "reading Rule 15(a) together with the LHWCA and the regulations promulgated thereunder," concluded "that the Director is the agency respondent within the contemplation of Rule 15(a). . . ." 681 F.2d at 284.

Brown & Root, Highlands, and Waukesha-Pearce argue that *White* applies only when the Director is seeking affirmance of the Benefits Review Board's holding, not when the Director is seeking reversal of that holding as here.

In *White*, however, the Court discussed *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982), and considered the argument that Rule 15(a) applies only where the Director is appearing to defend the Commission's or Board's decision as a legal representative of the agency. This is the argument made by Brown & Root and Waukesha-Pearce. The *White* court expressly rejected that interpretation of Rule 15(a).

Brown & Root and Waukesha-Pearce argue that *Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978) is controlling precedent in this case. *Donzi Marine*, however, dealt with the Director's standing as a petitioner under 33 U.S.C. § 921(c) (1976). It does not control the question of when the Director is a proper party respondent under F.R.A.P. 15(a). The Director is a proper party respondent before this Court.

REVERSED AND REMANDED IN PART.

APPENDIX B

BILLY THORNTON
Claimant-Petitioner

v.

BROWN & ROOT, INC.

and

HIGHLANDS INSURANCE COMPANY
Employer/Carrier - Respondents

NO. 79-126

DECISION and ORDER

Appeal from the Decision and Order of Joyce Capps, Administrative Law Judge, United States Department of Labor.

Atreus M. Clay, Houston, Texas, for the claimant.

Bradley A. Jackson (Royston, Rayzor, Vickery & Williams), Houston, Texas, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by claimant, Billy Thornton, from a Decision and Order (78-LHCA-477) of Administrative Law Judge Joyce Capps pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

At the hearing below, the administrative law judge found that claimant had incurred an injury arising out of and in the course of his employment as a crane rigger at employer's Greens Bayou fabrication facility. Although claimant was held to have sustained a 15 percent permanent partial loss of use of his left leg as a result of the injury, the claim was denied on the ground that jurisdiction had not been established under Sections 2(3) and 3(a) of the Act. 33 U.S.C. § 902(3) and 903(a).

The sole issue on appeal is whether the jurisdictional determination was rendered in accordance with law.

Operations at employer's Greens Bayou facility are exclusively directed towards the fabrication of "jackets"[1] and platforms used in offshore oil drilling. The fabricated parts of the platform are assembled directly onto "skids." Upon completion, the platforms are "skidded" from land onto barges by Brown & Root riggers for transportation to offshore locations where they are permanently affixed to the ocean floor.

Claimant's job as a crane rigger involved attaching the hook of a crane onto whatever had to be moved and set in place during construction. In addition, he occasionally participated in load-outs. On the day of the injury, claimant was assigned to the task of clearing one of the yards of construction materials. While dumping cross-ties from a truck, claimant fell off the vehicle and sustained a fracture of the left tibial plateau.

The Supreme Court has twice expressed its conclusion that the amended Act contains a two-pronged jurisdic-

1. "Jackets" are steel pipe structures, resting under platforms that are immersed in offshore waters.

tional test, one which requires a demonstration of both status and situs. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979).

Contrary to claimant's contention, the section 20 presumption that a claim comes within the provisions of the Act does not apply to the threshold issue of jurisdiction. *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc., v. Caputo, supra.* Thus, to establish jurisdiction, the claimant must demonstrate both situs and status without the aid of the presumption.

With respect to status, Section 2(3) defines "employee" under the Act:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship-builder, and ship-breaker. . . .

33 U.S.C. § 902(3). Thus, to demonstrate status as a maritime employee, a claimant must be engaged in one of the specific occupations enumerated in Section 2(3) or fall within the general category of "person(s) engaged in maritime employment." We conclude that claimant herein has not demonstrated that he falls within the coverage of Section 2(3).

First, we affirm the administrative law judge's finding that claimant is not a shipbuilder, ship repairman or shipbreaker. Since fixed offshore platforms are not ships or vessels, *Rodrigue v. Aetna Casualty and Surety Co.,* 395 U.S. 352 (1969); *Longmire v. Sea-Drilling Corp.,* 610

F.2d 1342 (5th Cir. 1980); *Thompson v. Crown Petroleum Corp.*, 418 F.2d 239 (5th Cir. 1969), claimant's construction work in conjunction therewith cannot establish status.

We further hold that claimant was not a longshoreman, nor was he engaged in longshoring operations. The administrative law judge noted that platform load-outs at employer's facility occur seven to ten times a year; each load-out took from one to five days, or an average of 21 workdays a year for a rigger. The fact that an insubstantial portion of claimant's work-time was spent on such operations is not sufficient to bestow upon him the status of a maritime employee as a person engaged in longshoring or as a longshoreman. *See Boudloche v. Howard Trucking Co.*, 11 BRBS 687, BRB No. 78-383 (1979).[2]

Moreover, claimant fails to fall within the harbor worker definition set forth in *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365, BRB No. 76-451 (1978), *aff'd sub nom. Brown & Root, Inc. v. Stewart*, 607 F.2d 1087 (4th Cir. 1979).[3]

Finally, claimant's primary or overall duties of assisting in the construction of offshore platforms lack a significant maritime connection, thus excluding claimant from the general category of maritime employees to whom the Act

---

2. Furthermore, claimant's work at the moment of injury (yard cleanup) is similar to support services of employees who have been held not to be covered. *See Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977).

3. In *Stewart*, the Board defined "harbor worker" as a person "directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships). . . ." 7 BRBS at 365.

extends coverage. *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB Nos. 77-897 *et al.* (1978), *aff'd*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). *See also Anderson v. McBroom Rig Building Service, Inc., supra; Toups v. Chevron Oil Co.*, 7 BRBS 261, BRB No. 76-453 (1977). Therefore, we conclude that claimant has not met the status test of Section 2(3).

Insofar as we hold that claimant has not met the status test, we need not address the situs issue, since the Act requires a demonstration of both aspects of jurisdiction to establish coverage. Accordingly, we affirm the Decision and Order Below.

SO ORDERED.

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's affirmance of the denial of benefits to the claimant in this case.

My colleagues and the administrative law judge have failed to heed the admonition of the Supreme Court in *Caputo, supra,* that the language of the 1972 Amendments is broad and that an expansive view should be taken of the extended coverage. 432 U.S. at 268. The Court also reiterated the longstanding doctrine that "[t]he Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 92, 98 L.Ed. 5 (1953)." 432 U.S. at 268.

The record is clear that claimant spent at least a part of his time in load-out operations. However, the administrative law judge and the majority find the fact that only a

"small" amount of time "was spent on the load-outs [which consist of the loading of a completed offshore drilling platform onto barges] is not sufficient to bestow upon him the status of a maritime employee as a person engaged in longshoring or as a longshoreman." Decision and Order at 5.

The administrative law judge went on to hold that "[t]he platforms never entered the stream of maritime commerce and as such were not the type of cargo included in the provisions of the Act dealing with the activity of loading." Decision and Order at 5. However, the administrative law judge based this finding on her own opinion which she apparently believed indisputable.

The administrative law judge overlooked the fact that a longshoreman is not concerned with the destination of the cargo, the use to which it is to be put, or the identity of the consignor or consignee. His only concern is moving cargo between a vessel and land, the size, shape, and nature of the cargo being important only as to the method employed in loading and the risks involved in handling such cargo.

Cargo is defined as: "In mercantile law. The load or lading of a vessel; the goods, merchandise, *or whatever* is conveyed in a ship or other merchant vessel." *Black's Law Dictionary*, 268 (rev. 4th ed. 1968) (emphasis added). *See also Webster's New International Dictionary*, 406 (2d ed. unabridged 1958). The platforms that claimant participated in loading are clearly within the definition, and all those engaged in moving them between ship and shore are engaged in longshoring operations.[1]

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1. The nature of cargo does not affect the maritime nature of its loading since maritime contracts include

In *Ford, supra,* the Supreme Court reiterated its prior holdings in *Caputo, supra* that "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment," 444 U.S. at , 100 S.Ct. at 337, and that Congress had counted as longshoremen "persons who spent 'at least some of their time in indisputably longshoring operations.' " 44 U.S. at , 100 S.Ct. at 333.

In *Ford* the Court concluded that:

> [A] definition of maritime employment that reaches *any worker* who moves cargo between ship and land transportation will enable both workers and employers to predict with reasonable assurance who on the situs is protected by the 1972 Act.

444 U.S. at , 100 S.Ct. at 338 (emphasis added).

In spite of the clear mandates in the Act, *Caputo,* and *Ford* requiring only that *a part or some* of an employee's duties need be maritime, my colleagues continue to apply the test which they have promulgated restricting maritime employment by requiring that "a *substantial portion* of an employee's duties should be maritime in order for him to meet the status test." *Boudloche, supra,* 11 BRBS at 691 (emphasis added). I have consistently maintained that my colleagues' test contravenes the Act, *Caputo,* and *Ford. See* my dissents in *Boudloche, supra; Howard v. Rebel Well Service,* 11 BRBS 568, BRB No. 78-502

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all contracts, (wheresoever they may be made or executed or whatsoever may be the form of the stipulations) which related to the navigation, business or commerce of the sea.

De Lovio v. Boit, 7 Fed. Cas. 418, 444, No. 3,776 (C.C.D. Mass. 1815) (Story, J.). In the instant case, it would be ludricrous to conclude that the loading of an offshore oil rig is somehow rendered non-maritime because the cargo itself is intended for a maritime purpose.

(1979); *Gilliam v. Wiley N. Jackson Co.*, 12 BRBS 556, BRB Nos. 79-388/A (1980); and *Miller v. Central Dispatch, Inc.*, BRBS , BRB Nos. 78-467/A and 79-655/A (Sept. 26, 1980).

That my colleagues' "substantial portion of an employee's duties" test is inapplicable to the Act was recently underscored by a Fifth Circuit decision which found coverage for a land-based employee. *Odom Construction Co., Inc. v. U.S. Department of Labor*, 622 F.2d 110 (5th Cir. 1980).

In *Odom* the court stated:

> The appellants urge that even if Maze was doing maritime work at the time of his injury, he is not a covered employee because he spent the great majority of his time doing indisputably land-based jobs. They assert that the 1972 amendments extended coverage only to workers who do primarily maritime employment. Arguably, our decision that Maze is a covered employee could be based solely upon the foregoing conclusion that he was engaged in maritime work at the time of his injury. We need not rest on this narrow ground, however, but can look at all the circumstances of Maze's employment. Where, as here, the claimant was doing maritime work that required him to go into the water and where a *significant part* of the *employer's overall work, 20%, was maritime, the policy of the Act strongly favors coverage.*
>
> * * *
>
> Denying recovery to Maze here would allow *employers* like Odom, *who do substantial amounts of both maritime and nonmaritime work, to avoid liability under the Act to workers injured while engaged in maritime activity simply by allowing each*

> *employee to do only a limited amount of maritime work. Under the Supreme Court's analysis in Caputo and Pfeiffer, such a result would be contrary to congressional intent.*

622 F.2d at 113 (citations omitted) (emphasis added).

My colleagues have promulgated a test with misplaced emphasis on the amount of *time* that the *employee* spends in maritime employment. In *Odom*, the claimant Maze was not normally assigned to perform *any* maritime work, but rather was engaged in a temporary two day maritime assignment. 622 F.2d at 112. The Fifth Circuit noted that, if claimant Maze had been a member of the employer's work-crew which normally was assigned to perform employer's maritime work, "*there would be no doubt about his status as a covered employee.*" 622 F.2d at 113 (emphasis added).

In the case at bar claimant was a member of the work-crew which performed the maritime aspects of employer's operations, *i.e.*, load-outs. Thus, the claimant satisfies the status test regardless of how much of the claimant's duties were maritime and whether the claimant was engaged in maritime employment at the time of injury. *Odom, supra;*[2] *Caputo, supra,* at 273-74.

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2. The conflict between my colleagues' "substantial portion of an employee's duties" test and *Odom* is highlighted by the fact that the court in *Odom* was only concerned that "where a significant part of *employer's* overall work, *20%*, was maritime, the policy of the Act strongly favors coverage." 622 F.2d at 113 (emphasis added). I note that in the instant case the administrative law judge found that a rigger like the claimant would participate in employer's load-outs about "seven to ten times a year and each load-out took from one to five days, or an average of 21 work days a year for a rigger (2½ days time 8½ occurrences)." Decision and Order at 4-5. Of course, the correct average would be 25½ work days per year (3 days times 8½ occurrences). In any event, it can not be questioned that a

Furthermore, a denial of coverage here would open a significant loophole in the Act. For if a stevedore had contracted to perform the load-outs, its employees would be covered as longshoremen. *See Odom, supra*, at 114-15. The fact that the employer performed the work with its own employees does not alter the nature of the employment from maritime to non-maritime.

Since the claimant satisfies the status test and the administrative law judge based her finding that the situs test was not satisfied on the mistaken impression that the year where claimant was injured was not an "adjoining area customarily used by an employer in loading . . . a vessel," Decision and Order at 7, I would reverse that finding, *Odom, supra*, at 114-15, and remand this case for entry of an award holding that claimant has satisfied both the status and situs requirements of the Act.

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significant part of the ***employer's*** overall work was maritime. In fact, resolving all factual doubts in the claimant's favor as required under the Act by *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), the load-out operations can be assumed to have involved 50 work days per year (5 days times 10 occurrences). This would represent approximately 20 percent of a 260 work day year, exactly the percentage which the Fifth Circuit found "significant" in *Odom*.

APPENDIX C

JAMES H. BROUSSARD
Claimant-Petitioner

v.

WAUKESHA PEARLE INDUSTRIES

and

HIGHLANDS INSURANCE COMPANY
Employer/Carrier-Respondents

NO. 79-422

DECISION and ORDER

Appeal from the Decision and Order of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

William P. Rutledge (Domengeaux & Wright), Lafayette, Louisiana, for the claimant.

Robert M. Mahony (Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell), Lafayette, Louisiana, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by claimant, James H. Broussard, from a Decision and Order (79-LHCA-413N) of Administrative Law Judge David W. DiNardi pursuant to the provisions of the Longshoremen's and Harbor Work-

ers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

A consolidated hearing was held on February 16, 1979, in New Orleans, Louisiana, following which a decision was rendered in favor of the employer and carrier, and from which another claimant, Murphy J. Landry, took no appeal. With regard to claimant Broussard, the administrative law judge held that claimant was not injured on a covered situs, nor did he fulfill the status requirement under the Act.

The sole issue on appeal is whether the claim for benefits comes within the jurisdiction of the Act.

On June 14, 1977, claimant sustained an injury arising out of and in the course of his employment as a fabrication fitter at employer's fabrication facility. The facility is used by employer exclusively for the fabrication of buildings for use by oil companies in offshore drilling operations.

The buildings are assembled into a large structure known as a platform. The parts of the platform are assembled on land; upon completion, they are hoisted onto barges by a subcontractor for transportation to offshore locations where they are permanently affixed to the ocean floor. The loading of a completed offshore drilling platform onto a barge is described as a "load-out," an operation that occurs approximately 10 to 12 times a year. Claimant has occasionally participated in loading-out operations, although the exact number of times that he has done so was disputed by both parties.[1]

1. Claimant alleged participation in 10 load-outs during 1976; the administrative law judge credited records which employer main-

Claimant's duties included the construction of various parts for steel structures built by employer that serve as living quarters, heliports, and power plants. On June 14, 1977, claimant sustained a back injury while sheeting a heliport being constructed on land. The injury occurred as claimant stepped down from the heliport to pick up and remove a wooden block in the way of a cherry picker.

It is undisputed that no ships, vessels or barges are built, repaired, or broken at the fabrication facility, and no ocean-going vessels put in at the facility for the purpose of loading or unloading cargo in maritime commerce.

As the administrative law judge correctly noted, the Section 20(a) presumption that a claim comes within the provisions of the Act is inapplicable to the threshold issue of jurisdiction. *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977).

Regarding jurisdiction, the Supreme Court has twice expressed its conclusion that the amended Act contains a two-pronged jurisdictional test, one which requires a demonstration of both status and situs. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979).

With regard to the status requirement, we hold that claimant was not a longshoreman, nor was he engaged

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tained in the ordinary course of business that revealed claimant's involvement in three load-outs during the 20½ months of his employment with employer. A witness for employer testified that 17 load-outs were conducted by employer during the same time span. Decision and Order at 7, 9.

in longshoring operations. Although claimant on occasion helped to secure platforms on barges, the amount of time he spent on load-out operations, even if load-out operations can be considered a longshoring activity,[2] is insufficient to bestow upon claimant the status of an employee engaged in longshoring operations, or a longshoreman.[3] *See Boudloche v. Howard Trucking Co., Inc.*, 11 BRBS 687, BRB No. 78-383 (1979).

Furthermore, claimant was not a harbor worker. The term "harbor worker" includes the occupations of shipbuilder, ship breaker, and ship repairman,[4] but is not limited thereto. In *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (1978), *aff'd on other grounds sub nom. Brown & Root, Inc. v. Stewart*, 607 F.2d 1087 (4th Cir. 1979), the term was defined to include "at least those persons directly involved in construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in loading, unloading, repair or construction of ships)." Claimant was involved in the construction of platforms for use in offshore oil operations. Accordingly, his employment was not related to the "construction, repair, alteration or maintenance of harbor facilities."

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2. We decline to rule whether "load-outs" constitute longshoring activity.

3. The parties disagree as to the frequency of claimant's participation in load-outs (see discussion, *supra*, note 1). However, in accordance with our standard of review, we rule that the administrative law judge's finding that claimant was involved in three load-outs during his employment is supported by substantial evidence in the record considered as a whole and is therefore affirmed.

4. Clearly, claimant was not a shipbuilder, ship breaker or ship repairman.

Moreover, claimant was not engaged in maritime employment, since his activity lacked any realistically significant relationship to activities involving navigation and commerce over navigable waters. *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB Nos. 77-896 *et al.* (1978), *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). Viewing claimant's overall activities, which has been the standard consistently applied by the Board, we conclude that he was a construction worker whose task of securing the paltforms to barges was a function incidental to his job of constructing the platforms. *See Howard v. Rebel Well Service*, 11 BRBS 568, BRB No. 78-502 (1979); *Cappelluti v. Sea-Land Service, Inc.*, 10 BRBS 1024, BRB Nos. 78-580 & 78-580A (1979); *Boudloche v. Howard Trucking Company, Inc., supra.* Claimant's primary or overall duties of assisting in the construction of offshore oil platforms lack the requisite maritime nexus. *See Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, 718-719, BRB No. 75-198 (1977); *Toups v. Chevron Oil Co.*, 7 BRBS 261, BRB No. 76-453 (1977).

Finally, claimant's work as a "fabrication fitter" has an even more tenuous connection to maritime employment than that of oil platform workers who perform their duties over navigable waters and who are not covered by the Act. *See Anderson, supra; Toups, supra.* In light of the Supreme Court's recent emphasis upon an occupational test of maritime employment, the status test has not been met in the instant case. *P. C. Pfeiffer Co., Inc. v. Ford, supra.*

Insofar as we hold that claimant has not met the status test of jurisdiction, we decline to address the situs issue.

Accordingly, we affirm the denial of coverage below.

SO ORDERED.

MILLER, Administrative Appeals Judge, dissenting:

For all of the reasons expressed in my dissent in *Thornton v. Brown & Root, Inc.*, BRBS , BRB No. 79-126 (Nov. 28, 1980) I must dissent from the majority decision denying benefits to the claimant.

The load-out operations do constitute longshoring operations; claimant spent at least some of his time in indisputably longshoring operations; and a significant part of the employer's overall work was maritime. Under these circumstances, "the policy of the Act strongly favors coverage," and if claimant is not found covered, "[u]nder *Caputo* and *Pfeiffer*, such a result would be contrary to Congressional intent." *Odom Construction Co., Inc. v. U.S. Dept. of Labor*, 622 F.2d 110, 113 (5th Cir. 1980). Therefore, claimant does satisfy the status test of the Act.

The administrative law judge based his finding that the situs test was not satisfied on the incorrect conclusion that the facility where claimant was injured was not an "adjoining area customarily used by an employer in loading . . . a vessel." Decision and Order at 10. However, the administrative law judge found that the facility was "used an average of twenty days a year for load-outs. . . ."[1] Decision and Order at 10.

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1. The maritime work performed on the situs was apparently slightly more than that performed on the situs in *Thornton, supra*. The administrative law judge found that about ten to twelve load-out operations lasting from one to five days each were conducted

The facility is thus customarily used in maritime employment and claimant also satisfies the situs requirement of the Act.[2]

Accordingly, I would remand this case for entry of an award holding that claimant has satisfied both the status and situs requirements of the Act.

Dated this 22nd day
of December 1980

each year. Decision and Order at 9. In *Thornton* the administrative law judge found that seven to ten operations of similar duration were conducted each year. *Thornton, supra,* slip op. at 4.

2. The fact that employer contracted another company to perform the actual hoisting of platforms from land to barges does not affect the result that claimant was injured on a covered situs. *See Odom, supra,* 622 F.2d at 114-15.

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 78-LHCA-477

OWCP No. 8-37576

In the Matter of BILLY THORNTON
Claimant

v.

BROWN & ROOT, INC.
Employer

and

HIGHLANDS INSURANCE COMPANY
Carrier

Atreus M. Clay, Esquire
5643 Turtle Creek
Houston, Texas 77017
For the Claimant

Ben L. Reynolds, Esquire
Bradley A. Jackson, Esquire
Royston, Rayzor, Vickery & Williams
Suite 3710
One Shell Plaza
Houston, Texas 77002
For the Employer and Carrier

Before: JOYCE CAPPS
Adminitrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for compensation arising under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

It is conceded that as a result of an accidential injury arising out of and in the course of his employment on January 8, 1977, Claimant was temporarily and totally disabled from January 9 through March 30, 1977.

The issues presented for determination are (1) whether Claimant's employment falls within the status and situs requirements of Secs. 2(3) and 3(a) of the Act, and (2) whether Claimant has sustained a 25% permanent partial disability to his left leg as he claims or 15% as Respondents contend.

Findings of Fact

On January 8, 1977, Claimant sustained an injury arising out of and in the course of his employment as a rigger for Brown & Root, Inc. at its Greens Bayou Fabrication Facility. That facility is used by Brown & Root exclusively for the fabrication of jackets and platforms (which are placed atop of jackets) for use in offshore drilling operations by oil companies for whom they are constructed. The jackets and platforms are assembled together into a gigantic structure which shall hereinafter be referred to simply as a platform. It takes three-to-four months to assemble and build one of these structures and Brown & Root builds seven to ten of them in a year's time. The fabricated parts of a platform are assembled directly onto skids. Upon completion they are "skidded" from land onto barges by Brown & Root riggers for transporta-

tion to offshore locations where they are permanently fixed in the ocean floor. The loading of a completed offshore drilling platform onto a barge is described as a "load-out." A load-out occurs seven to ten times a year and takes anywhere from one day to a week.

Claimant's job as a crane rigger involved attaching the hook of the crane onto pipe or whatever had to be moved and set in place during the process of building the platforms. He also participated in load-out operations which sometimes involved his having to reposition skids on the barges so they could accommodate the particular platform being skidded onto the barge.

It is undisputed that no ships, vessels, or barges are built, repaired, or broken at the Greens Bayou Fabrication Facility, and no ocean-going vessels put in at the facility for the purpose of loading or unloading cargo in maritime commerce.

The platforms were built in an area of the Greens Bayou Fabrication Facility known as "D" Yard. On date of injury Claimant was one of six men assigned the task of clearing "D" Yard of rebar (reinforced steel used in concrete), timbers, and crossties. A winch truck was used to haul said materials from "D" Yard about one-fourth mile to "C" Yard. While dumping some crossties off the back of the truck, Claimant fell off the truck and sustained a fracture of the left tibial plateau.

After wearing a long leg cast for seven weeks Claimant was started on soaks and range of motion exercises. Since returning to his regular employment as a rigger on April 1, 1977, he has lost no time from work because of his knee, although he has some intermittent pain when walk-

ing and there is occasional swelling. An arthogram of the left knee taken on May 18, 1977, revealed a small Baker's cyst. Based on the opinion expressed by Claimant's treating physician, Dr. Miguel L. Jocson (orthopedic surgeon) and on Claimant's testimony, I find that Claimant has a 15% permanent impairment of the left knee as of March 31, 1977.

It is established by stipulation of the parties that Claimant's average weekly wage at time of injury was $297.83 and that he has received from the Carrier a total of $2,024.00 under the Texas Workers' Compensation Act —$880.00 for temporary total disability for 11-3/7 weeks at $77.00 per week and an advance of $1,144.00 in contemplation of a permanent partial disability.

Conclusions of Law

It is concluded that the injury to Claimant's left knee has left him with a 15% permanent partial loss of use of his left leg. However, before he may prevail in his claim for compensation for said injury the status and situs requirements of Secs. 2(3) and 3(a) must be met.

The term "employee" is defined in Sec. 2(3) to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker.

Sec. 3(a) provides that compensation is payable under the Act for disability resulting "from an injury occurring upon the navigable waters of the United States" which includes "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area cus-

tomarily used by an employer in loading, unloading, repairing, or building a vessel."

The only business conducted by Brown & Root at its Greens Bayou Fabrication Facility is the fabrication, assembly, and construction of platforms for use in offshore drilling operations by oil companies for whom they are constructed and by whom they are permanetly imbedded in the ocean floor. At the time he was injured Claimant was cleaning up an area to make room for further fabrication activities, i.e., the raising of the fourth bent (side) of a jacket. Thus, he was engaged in the furtherance of his employer's business of fabricating fixed offshore drilling platforms. Such structures have been held not to be ships or vessels. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969); *Thompson v. Crown Petroleum Corp.*, 418 F.2d 239 (5th Cir. 1969). Sec. 2(3) of the Act speaks of occupations and it would appear that Claimant's occupation is more accurately that of a fixed platform builder since by no stretch of the imagination or of theory can he be deemed to be a shipbuilder as he contends. It is equally clear that he cannot be deemed to be a ship repairman, or a ship-breaker.

The Board has consistently held that an "adjoining area" as defined in Sec. 3(a) of the Act "is bounded only by the limits of its use as a maritime enterprise." *Murphy v. General Dynamics Corp.*, 7 BRBS 960, 965 (1978) and cases cited therein. In view of the fact that the entire facility at which Claimant worked was used exclusively for fabrication, assembly, and construction of offshore drilling platforms I am satisfied that his injury did not occur upon navigable waters or any adjoining pier, wharf, dry dock, terminal, building way, or marine railway.

In view of the foregoing, consideration will hereinafter be focused on whether Claimant was a longshoreman, a person engaged in longshoring operations, or a harbor worker and whether his injury occurred in an adjoining area customarily used by his employer in loading a vessel.

Claimant's primary duty as a rigger was participation in the construction of platforms to be used in offshore drilling operations and to occasionally help in the "skidding" of said platforms onto barges. The load-out of a platform occurred seven to ten times a year and each load-out took from one to five days, or an average of 21 work days a year for a rigger (2½ days times 8½ occurrences).

At the time Claimant was injured there was not a load-out in progress at the Greens Bayou Fabrication Facility. Therefore, he was not involved actually or directly in a loading or longshoring activity. He was at the time of injury performing his primary duty which was an essential role in the construction of fixed drilling platforms. The fact that a relatively small amount of his work time was spent in load-out operations is not sufficient to bestow upon him the status of an employee engaged in maritime employment as a person engaged in longshoring operations or as a longshoreman. The job of a longshoreman since the memory of man runneth not to the contrary is to load and unload cargo that has been or is destined to become a part of maritime commerce. Claimant never handled commercial goods and commodities which had been or was destined to be transported in vessels used in trade or commerce. The only item he ever loaded was a platform onto a barge for transportation to an offshore location where it was permanently affixed to the ocean

floor. The platforms never entered the stream of maritime commerce and as such were not the type of cargo included in the provisions of the Act dealing with the activity of loading.

Since Claimant never loaded cargo in maritime commerce, his occasional load-out activities cannot give him the status of a longshoreman or person engaged in longshoring operations even under the "continuous coverage"[1] rationale of *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977), which was followed by the Board in *Brady-Hamilton v. Herron*, 7 BRBS 409, *aff'd* 568 F.2d 137 (9th Cir. 1978), where the claimant was engaged in longshoring activity during at least a portion of his working day.

It has been stated that in order to be covered under the Act an injured worker must have "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters * * *." *Weyerhauser Company v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). In *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713 (1977) the Board held that a roustabout who was injured on a fixed oil well platform on navigable waters 60 feet offshore was not an employee under the Act because his duties lacked any significant maritime connection. The Board applied the general rule that "unless the activity bears a significant relationship to the

1. The Supreme Court held that one whose employment is such that he spends at least some of his time in indisputably longshoring operations is a statutory employee and that the text and history of the 1972 amendments "demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers [longshoremen] who, without the amendments, would be covered only for part of their activity." *Ibid.* 97 S.Ct. at 2362.

traditional interests of admiralty in maritime commerce, actions arising from such activities will not be considered maritime for the purpose of applying maritime law." (at p. 718). The Board held the same way for the same reasons in the case of *Toups v. Chevron Oil Co.*, 7 BRBS 261 (1977), involving a pumper-gauger who was working on an oil and gas production platform on navigable waters about three miles from shore. The Board emphasized in both cases that the only maritime connection with the workers' employment was the fact that the platforms on which they were injured were situated in navigable waters —and that fact alone was not sufficient to bring their injuries within the coverage of the Act. It is apparent that Claimant's primary duty of helping to construct a platform to be used in offshore drilling operations and his occasional duty of loading such platform onto a barge lacks the significant relationship to the traditional interests of admiralty in maritime commerce expressed in *Anderson* and *Toups*.

Claimant cannot be classified as a harbor worker since the primary duties of a harbor worker "pertain to the operation and care of vessels in trade or commerce within a port or harbor area." *Anderson v. McBroom Rig Building Service, supra* at p. 721. Nor does Claimant fall within the definition of harbor worker announced by the Board in *Stewart v. Brown & Root, Inc.*, 7 BRBS 356 (1978) as "those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) * * *." The mere fact that in the vicinity of the area Claimant was cleaning at the time of his injury there was a dock used by Brown & Root for load-outs does not

make him a dock builder or a person who maintains harbor facilities which include docks. That contention by Claimant is rejected because he was not performing either of those functions—he was purely and simply cleaning up the area to make room for the crane so it could lift up a jacket bent. This was just one more step in the overall process of constructing a platform.

Turning now to the situs issue, the Board has consistently held that an "adjoining area" as defined in the Act "is bounded only by the limits of its use as a maritime enterprise." *Murphy v. General Dynamics Corporation,* 7 BRBS 960, 965 (1978). The entire facility where Claimant was injured was used exclusively for fabrication, assembly, and construction of offshore drilling platforms and is used an average of 21 days a year for load-outs of completed platforms. The load-out of a platform is incidental to its construction in that platforms are built right onto the skids so that they can be skidded directly onto a barge.

Prior to the 1972 amendments the Act provided compensation only for those injuries occurring upon navigable waters. In amending Sec. 3(a) of the Act Congress was accepting the invitation of the Supreme Court in *Nacirema Operating Co., Inc. v. Johnson,* 396 U.S. 212, 90 S.Ct. 347 (1969) to extend the jurisdictional boundary line shoreward to insure "uniform treatment of *longshoremen* injured while loading or unloading a ship." *Ibid* at 223-224 (emphasis furnished). As has already been discussed, the platforms are not cargo in maritime commerce. Therefore, the load-out process involved in this case is not the type of activity contemplated by the phrase "adjoining area customarily used by an employer in loading * * * a vessel."

Arguendo if the Greens Bayou Fabrication Facility *were* considered to be an area covered by the Act, Claimant still could not recover because it is clear from the legislative history of the Act that the Act was not intended "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." *Committee on Labor and Public Welfare*, S. Rep. 92-1125 at 13, 92 Cong., 2d Sess. (1972). At the time of his injury Claimant was not engaged in any of the foregoing activities—he was performing duties which were essential to and in furtherance of his employer's business of platform construction.

All of the other theories of jurisdictional coverage advanced by Claimant in oral argument and post-hearing brief which are not specifically addressed herein have been carefully considered and rejected.

For all of the foregoing reasons it is concluded that the jurisdictional requirements of status and situs have not been met and that the claim filed herein must be denied.

Order

The claim for compensation filed by Billy Thornton is hereby denied.

/s/ JOYCE CAPPS
Joyce Capps
Administrative Law Judge

Dated: December 28, 1978
Washington, D. C.

APPENDIX E

U. S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

May 21, 1979

File No.: 7-50296
Re: James H. Broussard & Murphy J. Landry
Case No.: 79-LHCA-413N & 79-LHCA-414N

See Attachment For Addresses

Gentlemen:

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional

20 percent is added to the amount of compensation due if not paid within 10 days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, Suite 757, 1111 - 20th Street, N.W., Washington, D.C. 20036.

Sincerely,

/s/ MARILYN C. FELKNER
(Mrs.) Marilyn C. Felkner
Deputy Commissioner

Form Ltr. LS-20
Rev. Dec. 1978

Enclosure

Mr. James H. Broussard, Claimant
Mr. Murphy J. Landry, Claimant
Mr. William P. Rutledge, Esq., for James H. Broussard
Mr. James J. Cox, Esq., for Murphy J. Landry
Waukesha Pearce Industries, Employer
Highlands Insurance Company, Carrier
Mr. Robert M. Mahony, Esq., for Employer/Carrier
Kenneth Livaudais Claim Service, Insurance Adjuster
Honorable David W. Di Nardi
Associate Solicitor of Labor
Associate Director, LHWCA

Longshoremen's and Harbor Workers' Compensation Act, as extended

A petition for reconsideration of a decision and order must be filed with the Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210, within 10 days from the date the Deputy Commissioner files the decision and order in his/her Office.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within 30 days from the date upon which a decision and order has been filed in the Office of the Deputy Commissioner, or within 30 days from the date final action is taken on a timely filed petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30-day period described above, whichever period last expires. A copy shall be served upon the Deputy Commissioner and on all other parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

The date compensation is due is the date the Deputy Commissioner files the decision and order in his/her Office.

Form. Ltr. LS-20
Rev. Dec. 1978

CERTIFICATE OF FILING AND SERVICE

I certify that on May 21, 1979 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. James H. Broussard, 626 Lombard St., New Iberia, LA 70560—Claimant

Mr. William P. Rutledge, Esq., P. O. Box 3668, Lafayette, LA 70501

Mr. Robert M. Mahony, Esq., Suite 700, First Nat'l Bank Towers, Lafayette, LA 70502

Highlands Insurance Co., 600 Jefferson St., Houston, Texas 77002—Insurance Carrier or Employer (if self-insured)

Mr. Murphy J. Landry, P. O. Box 93, Loreauville, LA 70552—Claimant

Mr. James J. Cox, Esq., 702 Kirby St., Lake Charles, LA 70601

Kenneth Livaudais Claim Service, P. O. Box 2481, Lafayette, LA 70502

Waukesha Pearce Industries, P. O. Box 35068, Houston, Texas 77035

A copy was also mailed by regular mail to the following:

Judge David W. Di Nardi, Office of Administrative Law Judges, U. S. Department of Labor, Room 909, F. Edward Hebert Federal Bldg., 600 South St., New Orleans, LA 70130

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U. S. Department of Labor, Washington, D.C. 20211

/s/ MARILYN C. FELKNER
(Mrs.) Marilyn C. Felkner
Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

Form LS-19
Rev. Aug. 1975

U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Hebert Federal Building
Room 909, 600 South Street
New Orleans, Louisiana 70130

Reply to the Attention of: OALJ

In the Matters of

JAMES H. BROUSSARD Claimant	)	
against	)	Case No. 79-LHCA-413N
WAUKESHA PEARCE INDUSTRIES Employer	)	OWCP No. 7-50296
HIGHLANDS INSURANCE COMPANY[1] Carrier	)	
MURPHY J. LANDRY Claimant	)	
against	)	Case No. 79-LHCA-414N
WAUKESHA PEARCE INDUSTRIES Employer	)	OWCP No. 7-50175
HIGHLANDS INSURANCE COMPANY[1] Carrier	)	

1. Kenneth Livaudais Claim Service, named in the Notice of Hearing as Carrier, is the insurance adjuster for Highlands Insurance Company.

William P. Rutledge, Esq.
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For the Employer/Carrier

Before: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a consolidated hearing in the matter of two claims for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 901, *et seq.*), herein referred to as the "Act". Hearing was held on February 16, 1979 in New Orleans, Louisiana at which time all parties were given the opportunity to present evidence, oral arguments and post-hearing evidence and briefs, all of which have been identified and incorporated into the record as indicated. This decision is being rendered giving full consideration to the entire record.

The principal unresolved issues in controversy are:

1. With reference to both Claimants: (a) Whether the Employer and both Employees fulfill the jurisdictional requirements under the Act; (b) if so, the nature and extent of any disability; and (c) average weekly wage.

2. With reference to Claimant Murphy J. Landry: Whether Section 8(f) of the Act is applicable to limit the liability of the Respondents.

Based upon the entire record in this case, including the stipulations of the parties and the evidence adduced during the course of the hearing, I make the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

James H. Broussard testified that he was 35 years of age at the time of the hearing, married and the father of four children (Tr. 46), had completed high school through adult education classes (Tr. 27), that he was employed by the Employer as a fabrication fitter involved in "building (steel) buildings, constructing different parts of a building, putting them together, cutting angle irons, beams, building stairways, putting the porches up on the building" and that the parts are tack-welded together, that Employer's facility is located at the Port of New Iberia, Louisiana (Tr. 28) on a waterway which flows into the Gulf of Mexico and that small boats and barges (Tr. 29) use the waterway. These buildings are offshore living quarters for workers on offshore oil drilling fixed platforms; some have electrical generating plants and some have heliports on top. Mr. Broussard does not belong to a labor union, performs various duties for the Employer and has even been a roustabout (Tr. 30).

When the living quarters building has been completed it is mechanically hoisted and loaded upon a barge for shipment and delivery to the location of the offshore drilling platform (Tr. 31). The fabrication fitters first build, on the barge, "knee braces" to be used to support and secure the building to the barge. The fitters then put the braces against the four corners of the building, and a tacker tack welds the knee brace; thereupon, the welders weld the knee braces to the barge. Sometimes additional work is required on the braces to complete the process of securing the building to the barge. Mr. Broussard recalled that on two occasions he "rode on the barge while the tugboat pulled the barge back and turned it around so it could be brought back so that smaller buildings could be loaded on." (Tr. 32-33). Mr. Broussard testified that he participated in ten load-outs during 1976 and that there was a slack period just before the holidays of that year (Tr. 34). The smallest building was forty by fifty feet and the largest buildings were two story high and three stories with the heliport and were one hundred and forty or fifty feet high (Tr. 35).

Mr. Broussard commenced working for the Employer the latter part of 1975 and was injured on June 14, 1977 (Tr. 39), at about 2:30 p.m. or 2:45 p.m., while he "was sheeting the heliport" and injured his back when he attempted to remove a wooden block in the way of the cherry picker tire and as he stepped down and picked up the wooden block "my back snapped and I felt a sharp pain and my right leg came up and I couldn't move." (Tr. 40). Mr. Broussard then rested during a work break (Tr. 41) and worked for an hour or so, until the completion of the shift, believing that hot baths would minimize the pain.

However, Mr. Broussard could not sleep that night because of "the pain in my back and legs, right leg especially" and sought medical attention at about 6:00 a.m. the next morning (Tr. 42) after reporting to work and telling his leaderman that he was in severe pain. Dr. La Haskie gave him an injection for the pain (Tr. 43) and told him to go home, soak in warm water and place himself on bed rest. The pain increased and Mr. Broussard returned to Dr. La Haskie, who had him hospitalized and examined by an orthopedic specialist, Dr. Hebert. He was in traction for two weeks and a thirty pound weight was placed on his legs (Tr. 44). Mr. Broussard was then released and told to return to Dr. Hebert's office every day for physical therapy. Mr. Broussard told Dr. Hebert that the physical therapy was not helping (Tr. 45).

Mr. Broussard then contacted the Employer, found out that there were no compensation checks for him and decided to obtain legal counsel from William P. Rutledge, Esquire. Attorney Rutledge thereupon sent Mr. Broussard to a number of doctors, each of whom took X-rays (Tr. 46). Mr. Broussard was examined by Drs. Montgomery, Blanda, Borne, Foster, Moore, Llewelyn, and Leoni (Tr. 47). Mr. Broussard was hospitalized in Lake Charles, Louisiana, where a myelogram and discogram led Dr. Moore to tell him that "you're (sic) back is a mess" (Tr. 48). Dr. Foster recommended surgery and he thereupon removed a disc from his back.

However, Mr. Broussard was still in pain and complained to Dr. Foster who told him that there was nothing more he could do and to "stick it out until January which would be a year from my surgery and then he would put

me on total disability one hundred percent." (Tr. 49). Mr. Broussard was upset with the medical treatment he was receiving from Dr. Foster and he thereupon advised Mr. Rutledge to discharge Dr. Foster. Mr. Broussard testified that he would undergo further surgery if it would relieve his pain (Tr. 55), that since his accident he has been receiving $95.00 per week as compensation (Tr. 56), that at the hearing he was in "terrific pain" (Tr. 58) and that he is not in condition to work at the present time (Tr. 59). He also testified that some of the load-out procedures lasted at least one week and perhaps a week and a half (Tr. 63).

Upon cross-examination Mr. Broussard could not recall the number of times he performed the duties of a roustabout (Tr. 72) and did not know whether he could do light work such as answering a telephone (Tr. 73) or as a night watchman (Tr. 74).

Mr. Murphy J. Landry, the other Claimant herein, has a ninth grade education, has worked mostly as a laborer and welder and commenced working for the Employer in February 1975 as a fitter's helper (Tr. 78). He was injured on April 6, 1977, while working with the roustabouts picking up scrap steel and sorting out large pieces of iron from small pieces when he picked up a "five gallon can" or bucket of welding rods and felt his "back crack and it went" (Tr. 79) and "seemed pretty hard." Mr. Landry then told Darrell Lafont about his back injury who told him to "try to hold up until noon" and to return if it did not improve.

Thereupon, Mr. Landry was sent to see the company doctor (Tr. 80), Dr. Roy Landry, New Iberia, who prescribed pain pills, took x-rays and told him to return,

remarking that he would probably miss about thirteen days of work. Dr. Landry had Mr. Landry hospitalized in April 1977 where he was examined by Dr. Sutton (Tr. 81), an orthopedic specialist, who treated Mr. Landry until January 1979. A myelogram was performed and Dr. Sutton recommended surgery (Tr. 82) for the ruptured disc condition (Tr. 83). Mr. Landry was in the hospital for nineteen or twenty-one days (Tr. 88). Mr. Landry was also examined by Dr. Lamprose and then by Dr. Cobbs (Tr. 84) who had x-rays taken. In November 1978 Mr. Landry was examined by Dr. Charles A. Olivier, an orthopedic specialist (Tr. 85), who told him his back was very weak and that he would have to learn to live with the condition. Mr. Landry also saw Dr. Logan Perkins once (Tr. 86) and has an appointment with a Dr. Larrocco (Tr. 87).

Mr. Landry testified that before his injury he had no problem performing any of his assigned tasks as a roustabout (Tr. 88) or laborer or welder (Tr. 89). Prior to working for the Employer, Mr. Landry worked on a sugar cane farm, work which he described as "heavy work" and which he performed without any difficulty. Prior to this he was working for a firm involved in instelling pipeline—very heavy work, involving heavy lifting, stooping, bending and climbing (Tr. 91). Mr. Landry recalled that in 1968 he injured his back (Tr. 92, 112-116) and experienced muscle spasms and was treated by Drs. Homer Kirgis, Muhleman and Richard E. Patterson, that no surgery was performed (Tr. 93), that he was able to return to work in November 1970 and worked continually until the day of his injury (Tr. 94). Mr. Landry also recalled some back ailments about twenty

years ago and having to miss a few weeks of work (Tr. 95, 109-112).

Mr. Landry also participated in the load-out procedures by performing various tasks such as loading pumps on board the barges and pumping water into the barges when they were too high in the water to permit loading of the buildings (Tr. 96-97). Mr. Landry's duties were to then tack and weld the supports to the building to secure the building to the barge and to pump out the water from the barge at the completion of the load-out. Mr. Landry could not recall how many load-outs in which he participated in 1976 (Tr. 98) but then admitted "more than ten." Mr. Landry also helped load on the barges refrigerators and furniture (Tr. 99) eight or nine times (Tr. 101) and admitted that nine times out of ten he had to do additional fabrication work on the structures after they were loaded on the barges (Tr. 102) and that seventy-five or eighty percent of the structures were delivered by barges (Tr. 103). Mr. Landry recalled working on at least one and perhaps two load-outs during the three months he worked in 1977 (Tr. 104) but could not recall the length of the load-out (Tr. 107).

Upon cross-examination Mr. Landry admitted that all of the work he did as a structure welder took place on land except during the load-out procedures (Tr. 107). Mr. Landry admitted that there was no load-out taking place at the time he was injured on April 6, 1977 (Tr. 118), that the one load-out he worked in 1977 lasted twenty-five to twenty-six hours (Tr. 119) and that he is being paid State Compensation Benefits at the rate of $95.00 per week (Tr. 122). Mr. Landry made approximately $15,000 in 1976 (Tr. 123), was making $300.00 per

week in 1977 when he was injured and his hourly rate had just been increased to $5.30 per hour (Tr. 124). Mr. Landry was shown the form LS-202 indicating that in 1976 he earned wages of $12,172.81 (Tr. 126).

Mrs. James H. Broussard testified that her husband was very healthy prior to his accident and that thereafter "he had all types of problems" (Tr. 130) and was "in such terrific pain" in the lower part of his back, legs, toes, hands and his neck, ever since the night of the accident (Tr. 131). Her husband does not have the strength he had before the accident and has to use a cane most of the time (Tr. 132).

Mrs. Jaclyn M. Landry testified that her husband suffered from a back injury the latter part of 1968 to the fall of 1970, that he returned to work in November 1970 for a pipeline construction company in Houston, Texas, work which lasted six months (Tr. 135), that he harvested sugar cane for a time (Tr. 136), went to work for the Employer in February 1975 and did not have any trouble with his back until his accident on April 6, 1977, at which time he complained of pain in his back (Tr. 137). Mrs. Landry testified further that her husband, prior to the accident, was able to do heavy lifting but could not do so after the accident (Tr. 138).

Randy Jacobs testified that, during the years 1970 to 1973, he and Mr. Landry worked for various firms installing oil and gas pipelines, work which he chacterized as "hard labor" (Tr. 141), that he has known Mr. Landry for about twenty years (Tr. 143), that Mr. Landry has not had any accidents since April 1977 (Tr. 143) and that Mr. Landry was using a cane every time he saw him (Tr. 144).

Mr. Broussard earned $13,786.91 for 1976 and the first month of 1977 and earned $2,069.71 for the first three months of 1977 (Tr. 152).

Mr. Louis Peltier, Employer's District Manager, has worked for the Employer for thirty-two years and has held a number of positions during that time (Tr. 153). As District Manager, Mr. Peltier has responsibility for the operations of Employer's New Iberia, Louisiana facility (Tr. 154). He testified that the employer fabricates, at the facility in question, "packages, we call them modules . . . , a combination of living quarters, power plants . . . , some have heliports, some are generator packages . . . without any living accomodations or heliports. And some were pump packages, pump units" (Tr. 155-156).

Mr. Peltier identified photographs of the various units and packages made by the Employer, photographs which were admitted into evidence as Employer's Exhibits 4, 5 and 6 (Tr. 157-162). He testified that the structures identified as living quarters are placed on a fixed platform, offshore, in connection with oil drilling operations and permanently affixed to the bottom of the ocean (Tr. 160), the structure in Employer's Exhibit 5 having been built for Amoco Oil Company for shipment to the Gulf of Suez. He further testified that all of the structures end up on fixed platforms in the Gulf of Mexico, the North Sea, the Gulf of Suez or at some other point (Tr. 162), that the Employer does not build or repair or break up any ships, vessels or barges (Tr. 163), that Mr. Broussard was a fabrication fitter and that his duties were to take a set of blue prints and construct a building by assembling structural steel beams and that

Mr. Landry was a welder whose duties were to follow the fabrication fitters and weld that material which the fabrication fitter has fitted into position (Tr. 163).

Mr. Peltier testified further that the construction of those buildings takes place on land and that the Claimants would work on the barge only during a load-out, that an independent contractor, Lloyd Berard, is employed to hoist the buildings from the work site onto the barge (Tr. 164), that Mr. Broussard worked on three load-outs from August 4, 1975 to June 14, 1977 (Tr. 165-169) and that there were nineteen load-outs during this time (Tr. 174), and that Mr. Landry worked on two load-outs from February 18, 1975 to April 6, 1977 and that there were seventeen load-outs during this time (Tr. 174).

Mr. Peltier authenticated Employer's records and described the procedures used to account for work done by his employees on each particular work project (Tr. 175-190) to enable Mr. Peltier "to monitor costing on our fabrication yard" (Tr. 186). He testified that during March and June 1977 the Employer had twenty-two welders and ten fabrication fitters, the job descriptions of Mr. Landry and Mr. Broussard, respectively (Tr. 192), that during each load-out an average of five welders out of twenty-two (Tr. 193) and an average of two fitters out of ten would perform duties on the barge (Tr. 194).

Mr. Peltier described the steps involved in the load-out of the structures onto the barges (Tr. 200-203), testifying that the barges belong to the oil companies and they prefer to have the structure ready within forty-eight hours because of their schedules (Tr. 203), that "the module itself is never altered" after it is hoisted upon the barge (Tr. 211) although sometimes the supports have to be

altered to make a secure fit between the module and the barge (Tr. 212), that eighty percent of the modules are shipped by barge (Tr. 212), that the primary duties of Mr. Broussard and Mr. Landry were to construct the buildings (Tr. 214) on land (Tr. 216) and that he (Mr. Peltier) has been present and supervised ninety percent of the load-outs. He further testified that there might be eight load-outs in one year and twelve or thirteen another year (Tr. 221), that a welder or fitter might spend two or three days a month working on the barge and the remaining time working on land (Tr. 222).

Mr. Darrell Lafont, one of the Employer's supervisors of load-outs, testified each load-out took fifteen to sixteen hours (Tr. 228) and that a welder or fitter not working on the barge during a load-out would be working in the yard (Tr. 229).

Homer D. Kirgis, Ph.D., M.D., a neurosurgeon, testified by deposition and stated that he first examined Mr. Landry on December 11, 1968 (Employer's Exhibit 13, pg. 4), that Mr. Landry stated that he had been injured on August 13 or 14, 1968, when he and a fellow worker lifted a roll of felt and Mr. Landry made an extra effort to hold the roll as his co-worker allowed the roll to slip from his grasp. Mr. Landry slipped and fell backwards, "experiencing a 'snapping' sensation in the lower back." There was mild discomfort at first and two days later Mr. Landry went to a local doctor who prescribed medication (*Ibid.*, 5), heat treatments and sleeping on a hard bed. Mr. Landry had to stop working and went to see a doctor in his hometown who applied heat to his back, fitted him with a back support, told him to use a heating pad at home and prescribed some medication. Mr. Landry visited this doctor once a week (*Ibid.*, 6).

Dr. Kirgis further testified that Mr. Landry's back pain increased with activities such as riding, stooping, coughing and lifting and that prior to this accident Mr. Landry had no similar back problems (*Ibid.*, 7).

Dr. Kirgis' examination of Mr. Landry on December 11, 1968, revealed "asymmetry of the thoracical lumbar" area and "lumbar paraspinous muscles" (*Ibid.*, 7), a positive straight-leg raising test at 45 degrees on the left —indicating a more serious (*Ibid.*, 8) injury to the left of the midline than to the right and, according to the x-rays, moderate narrowing of the lumbosacral intervertebral space—rather permanent osteophytes on the anterior margins of the third and fourth lumbar vertebra—Dr. Kirgis concluding that Mr. Landry had ruptured a disc (*Ibid.*, 9) and that surgery would correct the problem.

On September 8, 1969, Mr. Landry advised Dr. Kirgis by letter that he had been disabled since August 1968, that his family doctor had recommended an operation and asked Dr. Kirgis to perform the surgery (*Ibid.*, 10). Dr. Kirgis responded, on September 15, 1969, that he agreed that Mr. Landry had a ruptured disc and that he would perform the operation (*Ibid.*, 11). Dr. Kirgis further testified that, as of December 11, 1968, Mr. Landry was unable to return to work because of his ruptured disc (*Ibid.*, 13), that the narrowing at the lumbrosacral level might cause nerve root irritation at that level, that the spur formation at the L-3 and L-4 level could have been caused by trauma but does not produce pain (*Ibid.*, 14-15).

Upon cross-examination Dr. Kirgis stated that Mr. Landry's "back was unstable", that spurs at the L-3/L-4 level, on the anterior margin of the vertebra, would cause pain (*Ibid.*, 16), that the preferred treatment would have

been surgery (*Ibid.*, 17) to enable Mr. Landry to return to work sooner to prevent "further difficulty in the future" (*Ibid.*, 19). Dr. Kirgis admitted that the ruptured disc at that time caused some degree of disability, although he could not rate the percentage of disability since Mr. Landry needed additional medical treatment (*Ibid.*, 20-21).

The record evidence reflects, and I find, the following as to the situs of Employer's fabrication facility, its operation and the duties of the Claimants.

On April 6, 1977, Claimant Murphy J. Landry sustained an injury arising out of and in the course of his employment as a laborer and welder for Waukesha Pearce Industries (Employer) at its New Iberia, Louisiana fabrication facility. On June 14, 1977, Claimant James H. Broussard sustained an injury arising out or in the course of his employment as a fabrication fitter for the Employer at the same fabrication facility.

This facility is used by Employer exclusively for the fabrication of buildings for use in offshore drilling operations by oil companies for whom they are constructed. The buildings are assembled together into a gigantic structure which shall hereinafter be referred to simply as a platform. It takes three to four months to assemble and build one of these structures and Employer builds ten to twelve of them in a year's time. The fabricated parts of a platform are assembled on land. Upon completion they are hoisted from land onto barges by Berard & Co., a private firm, for transportation to offshore locations where they are permanently fixed in the ocean floor. The loading of a completed offshore drilling platform onto a barge is described as a "load-out". A load-out occurs ten to twelve times a year and takes anywhere from one day to a week.

Mr. Broussard's work as fabrication fitter involved construction of different parts of the steel structures which are then tack-welded by a welder such as Mr. Landry, the other Claimant herein. Both Claimants participated in the load-out operations, the exact number of which has been disputed by both parties. Mr. Broussard testified he participated in ten load-outs and Mr. Landry testified to participating in at least ten load-outs. However, Employer's records disclose that Mr. Broussard worked on three load-outs for a total of 100 hours during 20½ months and Mr. Landry worked on two load-outs during his employment. I accept the validity of Employer's books and records kept in the ordinary course of business. Sometimes the load-outs required additional work, not on the platform itself, but on the support braces used to secure the platform to the barge for shipment to the Gulf of Suez, the North Sea or some other offshore drilling area.

It is undisputed that no ships, vessels or barges are built, repaired or broken at the New Iberia, Louisiana fabrication facility of Waukesha Pearce Industries, and no ocean-going vessels put in at the facility for the purpose of loading or unloading cargo in maritime commerce.

On the day of his injury, Mr. Broussard was hurt while sheeting the heliport and injured his back as he stepped down to pick up and remove a wooden block in the way of the tire of a cherry picker. Mr. Landry was hurt while working with several roustabouts picking up and sorting salvage scrap steel.[2]

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2. The parties stipulated, *inter alia*, and I find, that on April 6, 1977 and June 14, 1977, an Employer-Employee relationship existed at the time of the accidents, that the injuries are work-related and that the claims were timely filed.

Conclusions of Law

The 1972 Amendments to the Act effected an abandonment of an overwhelming situs-oriented concept of coverage in favor of a two-part test which requires (1) that a Claimant have been engaged in "maritime employment" and (2) that the injury have occurred on a situs specified in the Act. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976). The frontiers of post-1972 coverage have frequently been established in the context of classic longshoring and shipbuilding operations in numerous administrative and appellate court decisions.

Section 3(a) describes the covered situs:

> "Compensation shall be payable . . . , but only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

Perdue holds that an area's formal nomenclature is to be ignored and the record facts examined to determine if the situs is one customarily used in the maritime activity.

In *Perdue,* an office located one mile from the ship and a shed in an unused facility were each held not to be a covered situs. In other cases, the situs test was held to have been satisfied where the injury occurred at the back yard of a shipyard. *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir. 1977).

The Benefits Review Board has consistently held that an "adjoining area", as defined in the Act, "is bounded only by the limits of its use as a maritime enterprise." *Edith S. Murphy v. General Dynamics Corporation,* 7 BRBS 960, 965, BRB No. 77-249 (February 14, 1978). The entire facility where Claimants were injured was used exclusively for fabrication, assembly and construction of offshore drilling platforms and is used an average of twenty days a year for load-outs of completed platforms. The load-out of a platform is incidental to its construction in that platforms are constructed on land and then hoisted onto the barge for shipment to the offshore drilling site.

Prior to the 1972 Amendments, the Act provided compensation only for those injuries occurring upon navigable waters. In amending § 3(a) of the Act Congress was accepting the invitation of the Supreme Court in *Nacirema Operating Co., Inc. v. Johnson,* 396 U.S. 212, 90 S.Ct. 347 (1969) to extend the jurisdictional boundary line shoreward to insure uniform treatment of longshoremen injured while loading or unloading a ship. *Ibid.,* 223-224. As has already been discussed, the platforms are not cargo in maritime commerce. Therefore, the load-out process involved in this case is not the type of activity contemplated by the phrase "adjoining area customarily used by an employer in loading * * * a vessel."

Assuming, *arguendo,* that the New Iberia fabrication facility is an area covered by the Act, Claimants still could not recover because it is clear from the legislative history of the Act that the Act was not intended "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." *Committee on Labor and Public Wel-*

fare, S. Rep. 92-1125 at 13, 92 Cong., 2d Sess. (1972). At the time of their injuries, Claimants were not engaged in any of the foregoing activities. They were performing duties which were essential to and in furtherance of the Employer's business of platform construction.

The only business conducted by Employer at its New Iberia fabrication facility is the fabrication, assembly and construction of platforms for use in offshore drilling operations by oil companies for whom they are constructed and by whom they are permanently imbedded in the ocean floor. At the time they were injured both Claimants were cleaning up the area to make room for further fabrication activities, i.e. picking up a wooden block and sorting scraps of salvage steel. Thus, they were engaged in the furtherance of the Employer's business of fabricating fixed offshore drilling platforms. Such structures have been held not to be ships or vessels. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969); *Thompson v. Crown Petroleum Corp.*, 418 F.2d 239 (5th Cir. 1969). Section 2(3) of the Act speaks of occupations and it would appear that Claimants occupations are more accurately characterized as platform builders, since by no stretch of the imagination can they be deemed to be longshoremen or engaged in maritime employment as they contend. It is equally clear that they cannot be deemed to be ship repairmen or ship breakers. In view of the fact that the entire facility at which Claimants worked was used exclusively for fabrication, assembly and construction of offshore drilling platforms, I conclude that their injuries did not occur upon navigable waters or any "adjoining" pier, wharf, dry dock, terminal, building way or marine railway. Thus, it is manifestly clear that the Employer does not fulfill the situs requirement.

The Claimants herein were clearly not shipbuilders, ship breakers or ship repairmen. Nor could they be classified as longshoremen or as engaged in longshoring operations. Although Claimants on occasion helped to secure the platforms to barges, this did not alter the essential nature of their occupations. The Claimants were not engaged in "indisputably" longshoring operations. Viewing Claimants' overall activities, which has been the standard consistently applied by the Board, they were construction workers whose task of securing the platforms to barges was an incidental function to their job of constructing the platforms. *See McNeil v. Prolerized New England Co.*, 8 BRBS 1, BRB Nos. 77-328 & 77-328A (March 20, 1978); *Coppolino v. International Terminal Operating Co., Inc.*, 1 BRBS 205, BRB No. 74-136 (December 2, 1974).

The term "harbor worker", an occupation expressly covered by the Act, includes the occupations of shipbuilder, ship breaker and ship repairman, but is not limited thereto. Recognizing this fact, the Board, in *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365, BRB No. 76-451 (January 12, 1978), defined the term "harbor worker" to include "at least those persons directly involved in the construction, repair, alterations or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." The Claimants also cannot be deemed harbor workers under the *Stewart* rule. As noted previously, the Claimants were involved in the construction of platforms for use in offshore oil operations. Accordingly, their employment was not related to the "construction, repair, alteration or maintenance of harbor facilities."

It is clear that in order for the Claimants to satisfy the "status" test they must have been engaged in some form of "maritime employment" other than that expressly recognized in Section 2(3).

In approaching questions of status, the Supreme Court stated in *Caputo/Blundo* that we should take an expansive view of extended coverage and that the Act must be liberally construed. *Caputo/Blundo*, 432 U.S. at 268. The Court also pointed to the legislative history which establishes that by means of the 1972 Amendments it was Congress' intent to create a "uniform compensation system to employees who would otherwise be covered by this Act for part of their activity" and to accommodate coverage under the Act to modern technological change. *Ibid.*, 270-272. The Court however tempered these considerations by quoting other portions from committee reports to the effect that the committee did not intend to cover employees not engaged in loading, unloading, repairing, or building a vessel just because they are injured over a covered situs. *Ibid.*, 266, n.27. Moreover, the Court favorably cited *Stockman v. John T. Clark & Son of Boston*, 538 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). *Caputo, supra*, 277, n.40, 281. In *Stockman*, the First Circuit examined the Act's legislative history and concluded that:

> [the statement in the committee reports that the Act is to apply to employees who would be covered for part of their activity] as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or

> built them) and who fit such traditional maritime designations as longshoreman, harbor worker, and the like.

Stockman, Ibid., 276.

In view of the foregoing, it is clear that an injury over navigable waters in and of itself is an insufficient benchmark by which to find maritime employment. *See Caputo, supra; Thibodaux v. Atlantic Richfield Company*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978). Indeed, the Supreme Court clearly stated in *Caputo/Blundo*, 432 U.S. at 264-265, that:

> [t]he 1972 Amendments thus changed what had been essentially only a "situs" test of eligibility for compensation to one looking to *both the "situs" of the injury and the status of the injured.* [Emphasis added.]

Given the above considerations, I conclude that Claimants' employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). *Cf. Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (April 7, 1977); *Toups v. Chevron Oil Company*, 7 BRBS 261, BRB No. 76-453 (December 29, 1977). Since the Claimants herein were engaged in the construction of offshore oil drilling platforms, their employment did not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. It follows that the Claimants were not engaged in maritime employment pursuant to Section 2(3) and thus are not covered under the Act. Congress did not intend that

the phrase "maritime employment" include workers performing their usual function in the construction of a structure on land which *happened* to be situated upon navigable waters. To conclude otherwise would be to include under the Act a whole new group or class of employees not originally intended to be covered. Furthermore, to provide coverage to workers under the Act based solely upon some incidental work over navigable waters without regard to their individual status would be tantamount to the establishment of dual standards in the determination of jurisdiction.

Claimants, in effect, argue that some work over navigable waters is maritime employment within the meaning of Section 2(3). As noted above, the Act requires that the tests of "situs" *and* "status" both be satisfied in order for an individual to be covered. To hold that any work over navigable waters is sufficient for coverage would be to read out of the Act the "status" test. I note further that the Claimants were described as fabrication fitters and welders. Although the label put upon an employee's activity or occupation is not dispositive of a determination of status, it is of interest. *See Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 541, 4 RBS 482, 488 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaffirmed*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978).

In view of the foregoing, consideration will hereinafter be focused on whether Claimants were longshoremen, persons engaged in longshoring operations, or harbor workers and whether their injuries occurred in an adjoining area customarily used by the Employer in loading a vessel.

Claimants' primary duties involved construction of platforms to be used in offshore drilling operations and to occasionally help in the hoisting of said platforms onto barges. The load-out of a platform occurred ten to twelve times a year and each load-out took from one to five days.

At the time Claimants were injured, there was not a load-out in progress. Therefore, they were not involved actually or directly in a loading or longshoring activity. They were, at the time of injury, performing their primary duties which were an essential role in the construction of fixed drilling platforms. The fact that a relatively small amount of work time was spent in load-out operations is not sufficient to bestow upon them the status of an Employee engaged in maritime employment, or a person engaged in longshoring operations or as a longshoreman. The job of a longshoreman is to load and unload cargo that has been or is destined to become a part of maritime commerce. Claimants never handled commercial goods and commodities which had been or were destined to be transported in vessels used in trade or commerce. The only item they ever loaded was a platform onto a barge for transportation to an offshore location where it was permanently affixed to the ocean floor. The platforms never entered the stream of maritime commerce and, as such, were not the type of cargo included in the provisions of the Act dealing with the activity of loading.

Since Claimants never loaded cargo in maritime commerce, their occasional load-out activities cannot give them the status of a longshoreman or person engaged in the longshoring operations even under the "continuous coverage"[3] rationale of *Northeast Marine Terminal Co.*,

3. The Supreme Court held that one whose employment is such that he spends at least some of his time in indisputable longshoring

Inc. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977), which was followed by the Board in *Brady-Hamilton v. Herron*, 7 BRBS 409, *aff'd* 568 F.2d 137 (9th Cir. 1978), where the Claimant was engaged in longshoring activity during at least a portion of his working day.

In *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (April 7, 1977), the Benefits Review Board held that a roustabout who was injured on a fixed oil well platform on navigable waters 60 feet offshore was not an Employee under the Act because his duties lacked any significant maritime connection. The Board applied the general rule that "unless the activity bears a significant relationship to the traditional interests of admiralty in maritime commerce, actions arising from such activities will not be considered maritime for the purpose of applying maritime law." The Board held the same way for the same reasons in the case of *Toups v. Chevron Oil Company*, 7 BRBS 261, BRB No. 76-453 (December 29, 1977), involving a pumper-gauger who was working on an oil and gas production platform on navigable waters about three miles from shore. The Board emphasized in both cases that the only maritime connection with the workers' employement was the fact that the platforms on which they were injured were situated in navigable waters—and that fact alone was not sufficient to bring their injuries within the coverage of the Act. It is apparent that Clainants' primary duties of helping to construct a platform to be used in offshore drilling operations and the occasional

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operations is a statutory Employee and that the text and history of the 1972 Amendments "demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers [longshoremen] who, without the Amendments, would be covered only for part of their activity." *Ibid.*, 97 S.Ct. at 2362.

duty of loading such platforms onto a barge lack the significant relationship to the traditional interest of admiralty in maritime commerce expressed in *Anderson* and *Toups*.

Claimants cannot be classified as harbor workers since the primary duties of a harbor worker "pertain to the operation and care of vessels in trade or commerce within a port or harbor area." *Anderson v. McBroom Rig Building Service, supra*, at 721. Nor do Claimants fall within the definition of harbor worker announced by the Board in *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (January 12, 1978), as "those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) * * *." The mere fact that in the vicinity of the area Claimants were cleaning at the time of injury there was a dock used by Employer for load-outs does not make them dock builders or a person who maintains harbor facilities which include docks or a person handling deck cargo. That contention by Claimants is rejected because they were not performing either of those functions—they were purely and simply cleaning up the area to make room for construction of other platforms. This was just one more step in the over-all process of constructing a platform.

The "realistically significant relationship to maritime activity" test has been applied by the Benefits Review Board in the more recent decision of *Scala v. Island City Iron Supply, Inc.*, 9 BRBS 600, BRB No. 77-775 (January 17, 1979), wherein the Board held that a burner, fatally injured while cutting metal from a shipyard's dis-

used dry dock for a scrap metal dealer, was not a harbor worker since he was not involved in the construction or maintenance of harbor facilities and was not an Employee otherwise engaged in maritime employment within the meaning of that section since this activity did not realistically and significantly relate to navigation and commerce over water. In reaching that decision, the Board, in *Scala, supra,* at 602, noted as follows:

> "Section 2(3)— makes plain however that maritime employment includes but is not limited to harbor workers. 33 U.S.C. Section 902(3); *Sedmak v. Perini North River Associates,* 9 BRBS 378, BRB No. 77-896 *et al.* (November 30, 1978). In *Sedmak,* the Board considered the term "maritime employment" and, after considering the legislative history for the 1972 amendments and the relevant case law, held that in order to satisfy the maritime employment requirement of Section 2(3), the particular employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. *Sedmak v. Perini North River Associates, supra,* (slip op. at pg. 14). *See also Wright v. Traylor-Johnson Construction Co.,* 9 BRBS 372, BRB 77-591, and 77-591A (November 30, 1978). As noted above, the decedent was cutting up scrap metal pursuant to a sale and purchase by employer. Applying the *Sedmak* rule, we conclude that the decedent's employment did not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. Claimant has therefore failed to establish that decedent's employment satisfied the status test according to Section 2(3)."

The Section 20(a) presumption under the Act does not apply to the threshold issue of coverage and a determina-

tion of the status of the Claimant. The presumption is inapplicable to an interpretive question of general import such as coverage under Section 3. *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35 (2nd Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). "This basic interpretative decision must precede any application of the presumption." *Stockman v. John T. Clark & Son of Boston,* 539 F.2d 264, 269 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).

All of the other theories of jurisdictional coverage advanced by Claimants in oral arguments and post-hearing briefs which are not specifically addressed herein have been carefully considered and rejected.

For all the foregoing reasons, it is concluded that the jurisdictional requirements of status and situs have not been met and that the claims filed herein must be denied.

ORDER

It is therefore ORDERED that the claims for compensation filed by James H. Broussard and Murphy J. Landry are hereby denied.

/s/ DAVID W. DI NARDI
David W. Di Nardi
Administrative Law Judge

Dated: May 17, 1979
New Orleans, Louisiana

DWD:prc